Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LEA LAKESIDE-SCOTT,

Petitioner,

v.

MULTNOMAH COUNTY and JANN BROWN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In a First Amendment retaliation case, a jury verdict for plaintiff found that plaintiff's manager, who did not have hiring or firing authority, had retaliated against plaintiff by causing plaintiff's discharge, and that plaintiff would not have been discharged in the absence of plaintiff's protected conduct. The Ninth Circuit vacated the verdict, concluding (1) that a final decision-maker who discharges an employee with no improper motive can absolve a subordinate manager, like plaintiff's, of liability for her retaliatory acts against plaintiff; (2) plaintiff bore the burden of establishing causation by showing the final decision maker's discharge of plaintiff would not have occurred but for the retaliatory conduct of the subordinate manager; and (3) plaintiff's evidence was legally insufficient to create an issue of fact as to whether the final decision-maker's decision to discharge was wholly independent of the subordinate manager's retaliatory conduct.

Plaintiff's presented questions are:

1. Whether in a 29 U.S.C. § 1983 claim against a subordinate manager for deprivation of First Amendment rights, a plaintiff satisfies the "but-for" causation test upon producing sufficient evidence that a subordinate manager caused an investigation of plaintiff in retaliation for plaintiff's protected conduct, which the manager knew, or reasonably should have known, would lead to plaintiff's discharge under Mt. Healthy City School Dist. Bd. of

Educ. v. Doyle, 429 U.S. 274, 287, 50 L.Ed.2d 471, 97 S.Ct. 568 (1977) and Hartman, *et al.* v. Moore, 547 U.S. 250, 164 L.Ed.2d. 441, 126 S.Ct. 1695 (2006)?

2. Whether in an action against an individual subordinate manager under 29 U.S.C. § 1983 for deprivation of First Amendment rights, the Ninth Circuit erred by requiring plaintiff to prove the final decision-maker's decision to discharge was not a legitimate one wholly independent of a subordinate manager's unlawful motive, rather than requiring the defendant subordinate manager to establish the opposite of these same facts as an affirmative defense pursuant to Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) and Hartman, *et al.* v. Moore, 547 U.S. 250, 164 L.Ed.2d. 441, 126 S.Ct. 1695 (2006)?

3. Whether plaintiff's evidence that she received approval from her direct supervisor for the activities about which she was discharged, together with proof that the activities for which she was discharged disclosed proof of misconduct by high level County management employees, including the individual defendant Brown, was legally sufficient to create a material issue of fact on any affirmative defense available to Brown under Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) and Hartman, *et al.* v. Moore, 547 U.S. 250, 164 L.Ed.2d. 441, 126 S.Ct. 1695 (2006)?

Parties to the Proceeding and Rule 29.6 Statement

The caption to the case contains the names of all parties to this proceeding.

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PETITION OF WRIT OF CERTIORARI

Lea Lakeside-Scott respectfully petitions for a writ of certiorari to review the opinion and judgment in this case by the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS ENTERED IN THIS CASE

The opinion of the Ninth Circuit (App 1) is reported at Lea Lakeside-Scott v. Multnomah County and Jann Brown, 556 F.3d 797 (9th Cir. 2009). The Order of the Ninth Circuit's denial of plaintiff's Petition for Rehearing and Suggestion for Rehearing *En Banc* is not reported (App 39).

BASIS FOR JURISDICTION OF SUPREME COURT

The Ninth Circuit filed its Opinion on February 12, 2009. Plaintiff-Appellee timely filed a petition for rehearing and suggestion for rehearing *en banc* on February 26, 2009. The court entered an order denying Plaintiff-Appellee's petition on May 12, 2009. This Court has jurisdiction to review the circuit court's decision on a writ of certiorari under 28 U.S.C. § 1254(1).

RULES AND STATUTES INVOLVED IN THE CASE

First Amendment of the Constitution: "The Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."

42 U.S.C. § 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution or laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Oregon Revised Statutes § 659A.203 (1)(b): "(1) Subject to ORS 659A.206, except as provided in ORS 659.200 to 659A.224, it is an unlawful employment practice for any public employer to . . . (b) Prohibit any employee from disclosing, or take or threaten to

take disciplinary action against an employee for the disclosure of any information that the employee reasonable believes is evidence of: (A) A violation of any federal or state law, rule or regulation by the state, agency or political subdivision; (B) Mismanagement, gross waste of funds or abuse of authority or substantial and specific danger to public health and safety resulting from action of the state, agency or political subdivision; or . . . ."

STATEMENT OF THE CASE

1. Facts Relevant to the Petition

Lakeside-Scott was employed by Multnomah County as a "Systems Specialist II," a computer technician position. Her employment began in August 1997. Beginning in 1998, Lakeside-Scott began reporting to her immediate supervisor, Monna Hogue, the following:

(a) Observation of co-workers, including supervisory personnel like defendant Jann Brown, using County email and voice mail systems to run personal business ventures or to contact friends for social purposes while on County time, both in violation of County policies. Some emails indicated a lesbian relationship between Brown and Tami Williams, and an attempted relationship between Brown and Teresa Jones, both subordinates of Brown.

(b) Lakeside-Scott's computer receipt of messages from co-workers containing explicit sexual jokes and graphics, also in violation of County policy;

(c) Objection to Brown's favoritism in hiring and/or promotion of gay and lesbian employees; and

(d) Objection to the County's award of service contracts to independent contractors in violation of County funding sources' policies.

Lakeside-Scott collected computer information concerning these infractions. Over time, her collection became a continuing project, eventually numbering at least 167 pages. It came to be called the "Journal" during the course of this litigation.

In 2001, Lakeside-Scott told Hogue she had accidentally accessed a County server where more incriminating email was stored. Hogue's response advised Lakeside-Scott to return to the server to determine how many other managers' emails could be found and to generate a record of the misuse. Hogue did not tell Lakeside-Scott she might be in violation of County policy. During this discovery by Lakeside-Scott, Hogue testified she recalled the emails Lakeside-Scott brought her concerning Tami Williams and Brown, and that she experienced "disbelief" that these and other emails forced her to believe her superiors were misusing the County computer system (App 82).

Hogue passed on Lakeside-Scott's reports to another supervisor in her department, Dan Gorton, but did not discuss them with either Brown or the head of the department, Joanne Fuller. Neither Hogue nor Gorton initiated discipline of Lakeside-Scott because of her server access.

Brown, instead of addressing Lakeside-Scott's earlier complaints and objections, retaliated against her by:

1. First ignoring and then poorly accommodating Lakeside-Scott's requests for ergonomic furniture in her work place;

2. Refusing to re-classify Lakeside-Scott's position (which would have raised her salary) despite a recommendation of an outside consultant, and even though the County adopted the consultant's recommendations concerning similarly situated workers;

3. Refusing Lakeside-Scott's applications for promotion;

4. Directing Lakeside-Scott to perform tasks outside her classification;

5. Being dismissive of Lakeside-Scott's attempts to participate at departmental staff meetings;

6. Threatening Lakeside-Scott with discharge if she continued making complaints and objections;

7. Threatening to change Lakeside-Scott's scheduled work hours knowing the changes were the least convenient for her; and

8. Being told to get professional counseling to "learn how to get along in her department," and then being ridiculed for having done so.

On October 2, 2001, Lakeside-Scott filed a complaint with the Oregon Bureau of Labor and Industries ("BOLI") stating allegations listed above, specifically identifying Brown as retaliating against her. Under Oregon law, BOLI is charged with investigating claims of unlawful employment practices, including state law "whistleblower" claims.

Brown learned of Lakeside-Scott's BOLI complaint on October 16, 2001, stating she was "shocked" by the allegations and took them personally. Fuller learned of it on October 19, 2001.

After Lakeside-Scott filed her BOLI complaint, she contacted another County employee, David Landis, who had a history of challenging County personnel decisions and being supportive of other employees who were being mistreated by the County. In the course of her contact with Landis, Lakeside-Scott, on November 9, 2001, emailed 123 pages of the Journal to him. Aside from Landis and

Hogue, and then her BOLI investigator, Lakeside-Scott had not otherwise shared the Journal.

On November 9, 2001, counsel for the County filed a written response to Lakeside-Scott's BOLI claim, denying most of her allegations.

On November 20, 2001 Brown informed Fuller that Lakeside-Scott had accessed a "secure" County server that contained email threads naming Brown and Fuller. It was the same access Lakeside-Scott had reported to Hogue about. Brown learned of this access in the course of a "coincidental" investigation of Landis' computer, and once into his folders, thereby discovered the copy of Lakeside-Scott's Journal, again, replete with email exchanges between Brown and Tami Williams and Brown and Teresa Jones about their romantic relationships, or the lack thereof. The Journal also contained records of personal social activities of Fuller.

Fuller immediately placed Lakeside-Scott on paid administrative leave pending investigation of County computer misuse.

Also on November 20th, after Lakeside-Scott had been sent home, her office computer was removed from her office space and placed in Brown's office where it was made operational. Brown did a complete reading of Lakeside-Scott's Journal and directed a complete review of other files residing in Lakeside-Scott's computer over a period of weeks.

Fuller directed an investigation be made of Lakeside-Scott as to whether she had misused County property, conducted personal business on Multnomah County time, interfered with the work of others, had inappropriately accessed email and

calendars of other employees, and if she had engaged in workplace harassment. Fuller appointed a County Internal Affairs investigator, John Turner, to conduct the investigation.

Turner interviewed 22 employees and reviewed various written documents, including the Journal. When he questioned Lakeside-Scott, she told him she could not have improperly accessed any emails or calendars because Hogue had authorized the access. However, Hogue is reported as having also been interviewed by Turner, and denied the authorization. Turner believed Hogue, stating, without more, Lakeside-Scott was "not credible." Turner also interviewed a County human resources official, Celeste Umbras, who stated at trial that the computer information Lakeside-Scott had collected, and about which Lakeside-Scott was being investigated, were "certainly at the heart of her BOLI complaint."

Turner's conclusion from his investigation, which purposely ignored any of the allegations in Lakeside-Scott's BOLI complaint, was that the charges against Lakeside-Scott had merit.

Following the Turner investigation, Fuller, Brown and County counsel met shortly before the decision to terminate Lakeside-Scott was made. At trial, Fuller admitted that if Lakeside-Scott's allegations in her BOLI complaint were true it would be troubling as they would have been serious violations of County policy (App 82).

On January 31, 2002, Scott was suspended without pay for fifteen days. On February 14, 2002, she was discharged by the County.

On February 20, 2002, Lakeside-Scott filed a second BOLI complaint alleging (a) her being placed on administrative leave, being suspended and then discharged was in retaliation for her having complained of the County's conduct prior to having filed her first BOLI complaint; and (b) her having exercised her right to file her first BOLI complaint.

2. Proceedings Below

The claim for relief Lakeside-Scott took to trial was a 29 U.S.C. § 1983 action against her former supervisor, Brown – the subordinate manager -- for Brown's violation of Lakeside-Scott's First Amendment rights. An Oregon state whistleblower claim, ORS 659A.203, that provided for identical remedies was also brought but was later dismissed. At summary judgment, her § 1983 claim against the County was dismissed. Upon three days of testimony, the jury completed the substantive questions on the verdict form as follows:

1. Did plaintiff prove by a preponderance of the evidence that Jann Brown retaliated against plaintiff because she engaged in protected speech?

ANSWER: YES.

2. Did defendant prove by a preponderance of the evidence that the same actions would have been taken against plaintiff in the absence of her protected speech?

ANSWER: NO.

3. Did plaintiff suffer damages because of Jann Brown's retaliation?

ANSWER: YES ($140,000 economic damages and $10,000 non-economic damages)

4. Should the economic damages be reduced because defendant proved that plaintiff would have been terminated for the misconduct that was discovered following her discharge?

ANSWER: NO.

5. Did plaintiff prove by clear and convincing evidence that Jann Brown willfully, maliciously, intended to hurt plaintiff with a reckless and outrageous indifference to her health, safety, and welfare, and if so, is she entitled to punitive damages?

ANSWER: YES ($500,000).

Post-trial, the district entered judgment in favor of Lakeside-Scott and against Brown in the amounts the jury directed, as well as $141,583 in attorney fees and $4,459 in litigation costs. In post-trial briefing, the trial court denied Respondent's Rule 50(b) motion and a motion to vacate the punitive damage award, instead confirming Lakeside-Scott had indeed incurred a Constitutional harm. Notably, in her post-trial brief, Brown did not challenge the causation prong as to whether a jury could infer plaintiff's speech was a substantial or motivating factor in her termination. Regardless, the trial judge ruled Lakeside-Scott had satisfied this prong of the Mt. Healthy analysis.

On appeal the Ninth Circuit reversed the trial court's judgment on the § 1983 claim, thereby vacating the damages award, as well as any attorney fees and cost award. Upon remand, the trial court entered judgment in favor of Brown.

The basis of the Ninth Circuit's reversal was that Lakeside-Scott did not suffer a "Constitutional injury because "Fuller's wholly independent" decision to discharge Lakeside-Scott eliminated any causal connection between Brown's retaliation toward Lakeside-Scott and Lakeside-Scott's discharge. However, in her concurrent opinion, a member of the Ninth Circuit panel diverged from the majority in concluding Lakeside-Scott had presented sufficient evidence to satisfy the causation prong of the Mt. Healthy test, stating, among other issues:

"Because a reasonable jury could have found that Brown acted with a retaliatory motive when she brought Scott's journal to Fuller's attention, and because that act was a substantial and foreseeable link in the causal chain that led to Scott's termination, I cannot agree with the majority that Scott failed, as a matter of law, to show that her protected activity was a 'substantial or motivating factor' in her termination."

REASONS FOR GRANTING THE PETITION

This case presents questions of national, legal and societal importance that this Court has not previously addressed. The Ninth Circuit Court of Appeals has adopted a burden of proof in First Amendment retaliation cases in the employment context that is inconsistent with this Court's decisions in Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) and Hartman, *et al.* v. Moore, 547 U.S. 250 (2006).

The Ninth Circuit's newly adopted rule would insulate from liability subordinate managers who retaliate against employees for their protected conduct when a final decision-maker makes a wholly independent decision to terminate the plaintiff employee. Furthermore, the Ninth Circuit's rule would allocate to the plaintiff/employee, as part of her burden of proving "but-for" causation, the responsibility of showing the final decision-maker was either not wholly independent of the retaliating subordinate or that the final decision-maker's decision was not legitimate. This burden of proof is inconsistent with the burdens of proving causation set forth in Mt. Healthy and Hartman, inconsistent with the standards of causation in at least 6 circuits, inconsistent with common law rules, and prejudices public employees who have been subjected to retaliation for conduct protected under the First Amendment.

If not reversed, the Ninth Circuit's rule will permit public employers to protect retaliating subordinate managers from the natural

consequences of their own acts and will thus promote unlawful retaliation in violation of the First Amendment.

I. PLAINTIFF ESTABLISHED "BUT-FOR" CAUSATION THROUGH PROOF THAT A SUBORDINATE MANAGER INITIATED AN INVESTIGATION IN RETALIATION FOR PROTECTED CONDUCT THAT THE MANAGER KNEW OR REASONABLY SHOULD KNOWN WOULD CAUSE PLAINTIFF'S TERMINATION

In Mt. Healthy City School District Board of Education v Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977), the Court set forth the elements of a claim and the burdens of proof in a First Amendment retaliation case in the employment context. Under Mt. Healthy, the burden is placed on the plaintiff "to show her conduct was constitutionally protected, and that this conduct was a 'substantial factor,' or to put it in other words, that it was a 'motivating factor' in the [defendant's] decision..." Having carried this burden, the defendant must then show "by a preponderance of the evidence it would have reached the same decision as to [plaintiff's employment] even in the absence of the protected conduct." Mt. Healthy, *supra,* 429 U.S. at 287.

This Court reasoned that a rule of causation which focuses solely on whether protected conduct plays a part, substantial or otherwise, in an

employment decision could place the employee in a better position as a result of his or her exercise of constitutionally protected conduct than the employee would have occupied had he or she done nothing. This Court found that the constitutional principle was sufficiently vindicated if the employee is placed in no worse a position than if he or she had not engaged in protected conduct. Mt. Healthy, *supra*, 428 U.S. at 286.

This Court further developed the meaning of the Mt. Healthy causation rules in Hartman v. Moore, 547 U.S. 20, 126 S. Ct. 1695 (2006). In Hartman, the plaintiff filed a Bivens action against a federal prosecutor and five postal inspectors alleging he was subjected to a criminal prosecution in retaliation for his criticism of the U.S. Postal Service while lobbying and in testimony before Congress. This Court accepted certiorari in Hartman to resolve a split among the Circuit Courts as to whether the plaintiff was required to produce evidence of a "lack of probable cause" in 42 U.S.C. § 1983 and Bivens retaliatory prosecution lawsuits.

The Hartman Court discussed whether there was "the need to prove a chain of causation from animus to injury" in retaliatory prosecution cases by comparing the requisite causation in such cases to ordinary retaliation claims. In the normal retaliation case, "[w]hile the employee plaintiff must plead and prove adverse official action in retaliation for making the statements, our discussions of the elements of the constitutional tort do not specify any necessary details about proof of a connection between the retaliatory animus and the discharge,

which will depend on the circumstances." Hartman, *supra*, 547 U.S. at 258. Rather,

> "....The cases have simply taken the evidence of the motive and the discharge as sufficient for a circumstantial case that the one caused the other...(citation omitted)... It is clear, moreover, that the causation is understood to be but-for causation, without which the adverse action would not have been taken; we say that upon a prima facie showing of retaliatory harm, the burden shifts to the official to demonstrate that even without the impetus to retaliate he would have taken the action complained of (such as firing the employee)."

Id.

In Hartman, the Court imposed a requirement that a plaintiff in a retaliatory prosecution case show an absence of probable cause as an element of a plaintiff's case that must be pleaded and proven. Hartman, *supra*, 547 U.S. at 265. The Court based its holding upon findings that the evidence as to whether there was or was not probable cause will always be available and will be a valuable source of circumstantial evidence of retaliatory animus, the evidence of a defendant's retaliatory animus and plaintiff's injury is usually more complex than it is in other retaliation cases, and the law creates a

presumption that a prosecutor has legitimate grounds for the action he or she takes and this presumption is not lightly discarded. Hartman, *supra*, 547 U.S. at 263.

Thus, after the Court's decision in Hartman, the status of the law relating to causation in First Amendment retaliation cases is that a plaintiff who has evidence of a retaliatory motive and injury in the normal retaliation case has indeed established "but for" causation; and that in retaliatory prosecution claims there is a need to prove a chain of causation from animus to injury.

In this case, as noted by Judge Berzon in her concurring opinion, plaintiff made a *prima facie* showing of retaliatory motive and injury. That is, Brown reported plaintiff for investigation in retaliation for plaintiff's protected conduct[1]:

> "In this case, Brown reported Scott's journal to Fuller approximately one month after Scott filed her BOLI complaint. This close temporal proximity was probably sufficient on its own to support the jury's conclusion that Brown was motivated by retaliatory animus when she reported Scott ...(citations omitted)...In addition, Brown admitted at trial that Scott's BOLI complaint surprised and upset her, and that she took Scott's allegations personally. Also, Brown was asked to look for other material from Scott, but, before she finished doing so, she reported Scott to Fuller based on the journal alone."

Lakeside-Scott, *supra*, 556 F. 3d at 813.

Under this Court's precedent, Brown's act in reporting plaintiff for investigation is an adverse action sufficient to constitute a constitutional "injury" or "harm" for purposes of a First Amendment retaliation claim. See, Rutan v Republican Party of Illinois, 497 U.S. 62, 75, 110 S. Ct. 2729, 111 L.Ed.2d 52 n. 8 (1990) (noting that the First Amendment protects public employees from 'even an act of retaliation as trivial as failing to hold a birthday party for a public employee ...when intended to punish her for exercising her free speech rights); Elrod v. Burns, 427 U.S. 347, 359 n. 13, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)(stating that the conditions placed upon public employment need not be great in order to find that rights have been violated).

Upon a *prima facie* showing of but-for causation, Hartman is clear as to defendant Brown's affirmative defense, that "the burden shifts *to the official* to demonstrate that even without the impetus to retaliate he would have taken the action complained of (such as firing the employee)." Hartman, *supra*, 547 U.S. at 259. Emphasis added.

With respect to this affirmative defense under Mt. Healthy, all three Ninth Circuit judges failed to address whether Brown demonstrated she would have taken the action complained of, reporting Lakeside-Scott for investigation, without the impetus to retaliate. All three judges focused on whether *Multnomah County* would have terminated Lakeside-Scott in the absence of her protected

conduct, rather than on whether defendant *Brown* would have taken the same action in the absence of Lakeside-Scott's protected conduct. See, Lakeside Scott, *supra*, 556 F.3d at 805 (Judge Fisher stating that evidence negates the inference that Fuller would not have taken action against Lakeside-Scott but for Brown's retaliatory motives); Lakeside-Scott, *supra*, 556 F.3d at 815 (Judge Berzon stating that a reasonable jury could only conclude Fuller would have reached the same conclusion without prompting from defendant Brown).

Both in the trial court and on appeal, Brown never demonstrated that she would have taken the same action, i.e. reporting Lakeside-Scott for investigation, in the absence of the retaliatory conduct. As a result, under this Court's decisions in Mt. Healthy and Hartman, plaintiff's evidence was legally sufficient to establish "but for" causation for a constitutional injury against defendant Brown, and not a reason for reversal of the jury.

Establishing that defendant Brown committed a constitutional injury against Lakeside-Scott by reporting her investigation for retaliatory reasons does not necessarily support an award of damages based upon Lakeside-Scott's termination. However, because plaintiff established "but for" causation on her First Amendment retaliation claim, Brown was liable for all damages proximately caused by her retaliatory conduct.

The common law rules of proximate causation are quite clear and are not the rules the majority panel applied. The connection plaintiff needed to show between Brown's retaliatory reporting of Lakeside-Scott and the termination decision is whether

plaintiff's discharge was "foreseeable" to Brown at the time she reported Lakeside-Scott for investigation. The test of proximate causation is well established in the Circuit Courts, in the Ninth Circuit, and under the common law.

In the Ninth Circuit, an individual defendant may be said to have proximately caused an injury if they personally participate in the act or by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury. Johnson v. Duffy, 588 F.2d 740, 743-744 (9th Cir 1978). At least five other Circuit Courts have adopted the same causation standard for § 1983 claims. Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 560-61 (1st Cir.1989); Sales v Grant, 158 F.3d 768, 776 (4th Cir 1998); Tidwell v Schweiker, 677 F.2d 560, 569 (7th Cir 1982); Waddell v Forney, 108 F.3d 889, 894 (8th Cir 1997); Specht v Jensen, 832 F.2d 1516, 1524 (10th Cir 1987).

The Johnson proximate cause inquiry is also consistent with the common law of torts in Oregon and the common law nationally which allocate responsibility for a tortious harm based upon the "foreseeability" of the plaintiff's injury. See, Fazzolari v Portland School District No. 1J, 303 Or 1, 17, 734 P.2d 1326 (1987); see generally, Prosser and Keeton on Torts § 43. (Fifth Ed. 1984).

The majority panel in this case paid lip service to the Johnson proximate cause inquiry but declined to apply Johnson "literally" to Lakeside-Scott's case:

> "This general principle, as applied within the context of the employment setting, cannot be taken so literally as to convert into a constitutional tort a subordinate supervisor's mere participation in, while performing her normal supervisory responsibilities, the initiation of a disciplinary process that results in an employee's otherwise appropriate and lawful termination."

Lakeside-Scott, *supra*, 556 F.3d at 805 (App 12).

Judge Berzon, in her concurring opinion, disagreed with the majority panel finding that the Johnson test was easily met,

> "It is undisputed that Fuller launched the investigation that led to Scott's termination immediately after Brown presented her with Scott's journal. Because Scott's journal contained significant evidence of misconduct, Brown either knew or should have known that presenting the journal to Fuller would 'set in motion a series of acts' by Fuller that 'would cause [Fuller] to inflict the constitutional injury,'"

Lakeside-Scott, *supra*, 556 F.3d at 812 (App 31).

Further, Judge Berzon did not mention plaintiff's additional evidence that supported application of the Johnson causation test. In particular, both plaintiff's immediate supervisor, Hogue, as well as another supervisor, Gorton, knew of Lakeside-Scott's activities in accessing other employees' email to develop the Journal and neither supervisor took action to discipline Lakeside-Scott or to report Lakeside-Scott for investigation that could lead to discipline. This evidence also supports Judge Berzon's finding that plaintiff satisfied the Johnson standard for causation of the discharge.

The Ninth Circuit's newly adopted definition of "but for" causation therefore is inconsistent with this Court's opinions in Mt. Healthy and Hartman, inconsistent with the standard of proximate cause in the Ninth and at least five other circuits, and inconsistent with common law tort principles of causation.

II. THE NINTH CIRCUIT IMPROPERLY IMPOSED UPON PLAINTIFF THE BURDEN OF PROVING THE ACTIONS OF A FINAL DECISION-MAKER DID NOT ABSOLVE A RETALIATING SUBORDINATE SUPERVISOR OF LIABILITY FOR HER RETALIATORY CONDUCT

As demonstrated above, plaintiff established "but-for" causation through proof defendant Brown initiated an investigation of Lakeside-Scott for retaliatory reasons which Brown knew or reasonably

should have known would cause Lakeside-Scott's discharge. The Ninth Circuit did not analyze whether *Brown* would have taken the same action in the absence of Lakeside-Scott's protected conduct and, the Ninth Circuit instead focusing on whether *Multnomah County* would have taken the same action in the absence of Lakeside-Scott's protected conduct. The majority panel further assigned to plaintiff the burden of proving that the final decision-maker's decision to terminate Lakeside-Scott was either not legitimate or not wholly independent of the retaliatory subordinate.

None of this Court's decisions resolve the question whether, in a case filed against an individual subordinate manager for First Amendment retaliation, the actions of a higher level manager may absolve a subordinate manager from liability for damages for their own retaliatory conduct, and if so, whether the plaintiff or defendant bears the burden of proof.

If, however, this Court were to approve a new causation test that absolves subordinate managers from liability for retaliatory actions when a higher level manager makes an employment decision independently, both this Court's precedent, as well as proper application of the common law, show the burden should be placed squarely on the defendant subordinate manager.

Allocating such a burden of proof to the defendant subordinate manager is consistent with this Court's decisions in Mt. Healthy and Hartman. Under Mt. Healthy once plaintiff shows her protected conduct was a substantial factor in an employment decision, the burden shifts to the

employer/defendant to show the same decision as to plaintiff's employment would have been made in the absence of the protected conduct. Mt. Healthy, *supra*, 429 U.S. at 287. Under Hartman, upon a plaintiff's showing a subordinate manager has a retaliatory motive and thereafter takes an adverse action, plaintiff has made a "*prima facie* showing of retaliatory harm" and "the burden shifts to the defendant official to demonstrate that even without the impetus to retaliate he would have taken the action complained of..." Hartman, *supra*, 547 U.S. at 260.

If plaintiff must also prove something more than her termination was foreseeable to the retaliating subordinate manager, then Hartman and Mt. Healthy's shifting of the burden of proof to the individual defendant or the public employer defendant has been effectively eviscerated.

Similarly, reference to common law rules applicable to torts would not support shifting the burden of proof to the plaintiff. And the legislative history of § 1983 demonstrates it was intended to "[create] a species of tort liability" in favor of persons who are deprived of "rights, privileges, or immunities secured" to them by the Constitution. Imbler v Pachtman, 424 U.S. 409, 417, 47 L.Ed.2d. 128, 96 S.Ct. 984 (1976). The cardinal principle of damages in Anglo-American law is that of compensation for the injury caused to the plaintiff by the defendant's breach of duty. Carey v. Piphus, 435 U.S. 247, 259, 55 L.Ed.2d. 252, 98 S.Ct. 1042 (1978).

The common law of torts has as well developed a set of rules to implement the principle that a person

should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery provide the appropriate starting point for the inquiry under § 1983 also. Where the interests protected by a particular branch of the common law of torts closely parallel the interests protected by a particular constitutional right, it may be appropriate to apply tort rules of damages directly to the § 1983 action. Where the interests protected by a constitutional right are not protected by an analogous branch of the common law of torts, the task will be to adapt common-law rules to provide fair compensation for injuries caused by the deprivation of rights. Carey, *supra*, 435 U.S. at 258.

The common law of torts provides guidance as to whether the actions of a third party or an independent force may absolve a tort-feasor of responsibility for his or her actions. The rules of an "intervening force" or a "superceding" cause are the common law rules that could apply to determine whether an individual subordinate manager who initiates an investigation against an employee for retaliatory reasons should be absolved by the actions of a higher level manager. However, the common law rules of intervening force shows that the Ninth Circuit's test in this case, whether a final decision-maker made a wholly independent legitimate decision to discharge the plaintiff, is not an appropriate test to absolve a tort-feasor of liability, like a subordinate manager, for their conduct.

Restatement, Second, Torts § 440 defines a superceding cause as "an act of a third person or

other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." Section 441 of the Restatement defines an intervening force as "one which actively operates in producing harm to another after the actor's negligent act or omission has been committed." Restatement, Second, Torts § 441.

Under the normal common law rule, an intervening or superceding cause must be unforeseeable at the time the tortfeasor acted. An event or force that is foreseeable to the tortfeasor does not absolve the actor from liability under common law rules. Doyle v. Exxon Corp., 592 F.2d 44, 48 (2nd Cir 1979); Chicago, Rock Island & Pacific R. Co. v. Goodson, 242 F.2d 203, 207 (5th Cir., 1957); Miles v. Kohli & Kaliher Associates, Ltd., 917 F.2d 235, 251 (6th Cir 1990); Phelps v. Sherwood Medical Industries, 836 F.2d 296, 304 (7th Cir 1987); Walton v. Eckhart, 354 F.2d 35, 35 (8th Cir. 1965); White v. Roper, 901 F.2d 1501, 1506 (9th Cir. 1990); Cook ex rel. Tessier v. Sheriff of Monroe County, 402 F.3d 1092, 1120 (11th Cir., 2005).

Application of the normal common law rules of an intervening or superceding cause to a § 1983 claim such as plaintiffs shows that a retaliating subordinate manager should never be absolved from liability for causing a foreseeable termination of the plaintiff by a higher level manager. Thus, the proximate cause standard from Johnson v. Duffy currently used in at least six Circuit Courts properly eliminates any intervening or superceding causes because it requires a finding that any injury be foreseeable to the tortfeasor. Under the standard of

a proximate cause in Johnson, the actions of a higher level manager to discharge an employee can not absolve a subordinate manager for their retaliatory conduct in reporting an employee for discipline unless the subordinate manager could not foresee that the employee would be terminated.

III.

PLAINTIFF'S EVIDENCE THAT HIGH LEVEL COUNTY MANAGERS WERE MISUSING THE COUNTY'S EMAIL AND COMPUTER SYSTEMS WAS LEGALLY SUFFICIENT EVIDENCE FROM WHICH THE JURY COULD FIND LAKESIDE-SCOTT WOULD NOT HAVE BEEN TERMINATED ABSENT HER PROTECTED CONDUCT

In the District Court, the Verdict Form required the jury to respond to questions related to affirmative defenses. The jury answered "No" to the question of whether "defendant would have taken the same actions in the absence of protected speech" (App 78). District Court Judge Mosman denied motions for judgment as a matter of law on the affirmative defense at the conclusion of the evidence and post-trial.

On appeal, defendant Brown did not assign error to Judge Mosman's decision to deny the motion for judgment as a matter of law on the affirmative defense. Thus, the question of whether Brown

proved any affirmative defense should be construed as waived.

Nevertheless, the Ninth Circuit panel majority concluded plaintiff did not show the County's final decision-maker failed to make a legitimate decision wholly independent of Brown's retaliatory motives. Further, Judge Berzon's concurrence in the judgment concluded that she would hold defendant Brown proved plaintiff would have been terminated in the absence of her protected conduct. Thus, this case also raises the question of whether plaintiff's evidence was legally sufficient to create an issue of fact on Brown's affirmative defense.

The proper standards for evaluating whether Brown was entitled to judgment as a matter of law on any affirmative defense is set forth in Reeves v. Sanderson Plumbing Co., 530 U.S. 133 (2000). Under Reeves, the court reviews the record as a whole, draws all reasonable inferences in favor of the nonmoving party, makes no credibility determinations and does not weigh the evidence. Reeves, *supra*, 530 at 150. Although the court reviews the record as a whole, the court disregards all evidence favorable to the moving party that the jury is not required to believe. That is, the court gives credence to the evidence favoring the non-movant as well as the evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses. Reeves, *supra*, 530 at 151.

Brown's affirmative defense was based upon evidence that in an investigation of another employee's computer (Landis), Brown and another employee, Tami Williams, found evidence Lakeside-Scott had accessed the email of other employees. Defendant Brown reported what was found to Fuller who started an investigation and made the final decision to terminate Lakeside-Scott for improperly accessing emails of other employees. Brown's own testimony and that of Fuller state Brown did not participate in the termination decision.

At trial and on appeal, Lakeside-Scott's evidence on the affirmative defense was as follows:

1). Lakeside-Scott's immediate supervisor, Hogue, knew of Lakeside-Scott's accessing other employees emails, authorized Lakeside-Scott to access other employees emails, knew of the information Lakeside-Scott gathered by accessing other employees emails, discussed Lakeside-Scott's actions with another supervisor, Gorton, and neither Hogue nor Gorton disciplined or reported Lakeside-Scott to higher level managers for investigation.

2). Lakeside-Scott's conduct in accessing other employees' emails proved that high-level managers of the County (including Brown and Fuller) were engaging in misconduct by misusing the email system and computer equipment;

3). The high-level managers' misuse of emails systems and computer equipment was the subject of Lakeside-Scott's BOLI complaint; and,

4). The County's final decision-maker, Fuller, knew of the substance of Lakeside-Scott's BOLI complaint when she made the decision to terminate Lakeside-Scott.

The trial judge correctly rejected Brown's pre-verdict and post-trial motions for judgment as a matter of law on the affirmative defense because Lakeside-Scott's evidence showed Brown and Fuller were not "disinterested witnesses" under Reeves. In short, the evidence at trial permitted the jury to disbelieve the testimony of higher level managers (such as Brown and Fuller) on the grounds that their trial testimony and their termination of Lakeside-Scott was an effort to cover up their own misconduct and that of other high-level managers.

The evidence at trial established that plaintiff's protected conduct involved a complaint she filed with BOLI. Oregon's whistleblower law prohibits public employers from taking disciplinary action against public employees who disclose mismanagement, gross waste of funds, abuse of authority or violation of federal or state law, rule or regulation. Or. Rev. Stat. §659A.203 (1)(b).

Lakeside-Scott's complaint to BOLI asserted she was being subjected to harassment and discrimination because she reported to one of her supervisors, Monna Hogue, that other County employees were grossly misusing public equipment, abusing their authority and engaging in various acts of unlawful discrimination.

Lakeside-Scott's BOLI complaint made specific allegations related to misuse of the County email and computer systems. She asserted, *inter alia*, that employees were using the County email, telephone and computer system to run their personal businesses and for social purposes; that employees were using the email and computer equipment to send or share sexual jokes and sexual graphics; that

employees were engaging in hiring practices based upon hiring managers' interest in pursuing sexual relationships with prospective employees or based upon hiring managers' interest in selecting personal friends of the same gender or sexual orientation for employment.

Plaintiff's supervisor, Hogue, testified at trial that when Lakeside-Scott showed her the emails Lakeside-Scott discovered accessing other employees email, Hogue had a hard time believing the emails actually existed. Hogue testified she had a difficult time believing in the existence of the emails in part "because to believe the existence of those emails required me to believe my superiors were misusing County equipment." (App 82). The County's Director of Human Resources testified at trial and admitted that "[s]ome of the things she [Lakeside-Scott] had in her journal were at the heart of the BOLI complaint." The final decision-maker, Fuller, admitted some allegations in Lakeside-Scott's BOLI complaint alleged serious violations of County policy and that the information Lakeside-Scott's gathered in her journal was similar to the allegations in Lakeside-Scott's BOLI complaint. (App 82).

These admissions at trial were sufficient for Judge Mosman and sufficient for the jury to discredit Brown's efforts to establish an affirmative defense. Further, these admissions at trial were a legally sufficient basis for the jury to find that Brown and Fuller were not "disinterested witnesses" under Reeves because of a desire to cover up their own misconduct.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

DATED this 7th day of August, 2009.

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Lea LAKESIDE-SCOTT,
Plaintiff-Appellee,

v.

MULTNOMAH COUNTY,
Defendant,

and

Jann Brown,
Defendant-Appellant.

No. 05-35896
D.C. No.
CV-02-01505-
MWM
OPINION

Appeal from the United States District Court
for the District of Oregon
Michael W. Mosman, District Judge, Presiding

Argued and Submitted
November 9, 2007 - Portland, Oregon

Filed February 12, 2009

Before: Raymond C. Fisher and Marsha S. Berzon,
Circuit Judges and Judith M. Barzilay, Judge.*

Opinion by Judge Fisher;
Concurrence by Judge Berzon.

COUNSEL

George P. Fisher, Portland, OR, for the plaintiff-appellee.

Jenny M. Morf (argued), Assistant County Attorney; Katie A. Lane, Assistant County Attorney, Portland, OR, for the defendant-appellant.

OPINION

FISHER, Circuit Judge:

This appeal involves an alleged retaliatory discharge of an employee after she complained about co-workers and one of her supervisors and presents a question that this circuit has not yet answered: Can a final decision maker's wholly independent, legitimate decision to terminate an employee insulate from liability a lower-level supervisor involved in the process who had a retaliatory motive to have the employee fired? We conclude that, on the record in this case, the answer must be yes, because the termination decision was not shown to be influenced by the subordinate's retaliatory motives.

The plaintiff-appellee, Lea Lakeside-Scott ("Scott"), was fired from her position as an information systems specialist at Multnomah County's Department of Community Justice ("DCJ"), ostensibly for her improper use of DCJ's computers and email system. Scott then brought this lawsuit alleging that her termination was actually in

retaliation for her engaging in speech protected under the First Amendment and by Oregon's whistleblower protection statute. While she was employed at DCJ, Scott had complained about co-workers' [556 F.3d 800] violations of County policies, including by one of her supervisors □ Jann Brown □ whom she also accused of favoring gay and lesbian employees in hiring and promotion decisions. Brown played a role in the process that led to Scott's termination, although the ultimate decision was made independently by Joanne Fuller, director of DCJ's information systems department. Scott contends that Brown wanted to retaliate against Scott for her accusations against Brown, and thus unlawfully influenced Fuller's decision to fire Scott.

Scott filed her retaliatory discharge claim against the County and Brown in federal district court. After a trial, a jury found in Scott's favor, awarding her $650,000 in compensatory and punitive damages against Brown.[1] The district court denied Brown's motion for judgment as a matter of law ("JMOL"), and this appeal followed. We conclude there was insufficient evidence to support the verdict against Brown, given the evidence that it was Fuller's independent decision to terminate Scott. We therefore reverse the district court's denial of Brown's JMOL and remand for entry of judgment in her favor.

BACKGROUND[2]

Scott began her employment in DCJ's information services unit in August 1997. During the relevant time period, her direct supervisor was

Monna Hogue. Hogue reported to Dan Gorton, who reported to Brown, who, in turn, reported to the department's director, Ms. Fuller.

Scott frequently complained to Gorton and Hogue about her perceived problems in the office. Her grievances included personality conflicts with other DCJ employees, promotions she did not receive and alleged misuse of the County computer system by co-workers and managers. In October 2001, Scott filed a formal complaint with the Oregon Bureau of Labor and Industries ("BOLI complaint") alleging, among other things, that Brown gave preferential treatment to gays and lesbians in hiring and promotions. Brown learned about the BOLI complaint shortly thereafter; she was shocked by its allegations of favoritism, which she took personally.

In November 2001, Fuller ordered Brown to search the email of an employee, David Landis, as part of an investigation of another DCJ employee who had allegedly sent racially discriminatory emails at work. Lacking the technical ability to do the search herself, Brown directed Tami Williams to do it. Williams sent the emails and attachments she recovered during her search to the human resources department. Attached to one of these emails was a journal, written by Scott and sent by her to Landis, that contained discriminatory comments and excerpts of other employees' work documents. It is unclear whether Williams knew about the journal when she sent the emails to human resources. After human resources personnel discovered the journal, either they or Fuller instructed Brown to look for additional material from Scott.[3] [556 F.3d 801]

In the meantime, either someone in human resources or perhaps Williams informed Brown about Scott's journal having been found among Landis' email documents. When Brown read the journal, which included excerpts of personal emails and documents from co-workers and supervisors as well as several apparently derogatory remarks about homosexuals, she immediately showed it to Fuller. At an ensuing meeting attended by Fuller, Brown and a County counsel, Fuller decided to place Scott on administrative leave (standard practice during an employee investigation) and directed Brown to write a letter to Scott informing her of this decision. With the assistance of the human resources department, Brown prepared and signed a standardized letter advising Scott she was being placed on administrative leave. After consulting with the human resources department and Fuller about how to present the letter to Scott, Brown had Scott come to her office the next morning along with two other managers, Gorton and Rich Scott, in case there "was any trouble." After the meeting, Brown instructed the two managers to unplug Scott's computer, which they placed in Brown's office, where it was "made operational."

Once Scott was placed on administrative leave, Fuller directed John Turner, an investigator on her staff, to conduct an internal inquiry into Scott's possible violations of County work rules or policies. Brown was not involved in framing the charges to be investigated, outlining the direction of the investigation or providing a list of witnesses. Rather, Turner met with Collette Umbras, the human relations department manager, to outline which

official work rules were implicated by Scott's supposed misconduct. The charges ultimately included misusing County property, conducting personal business on County time, inappropriately accessing the emails and documents of other employees and engaging in prohibited workplace harassment and prejudicial acts. Fuller sent Scott a letter to notify her of these charges as Turner began his investigation.

Over the course of his investigation, Turner interviewed 22 witnesses, including Brown and Scott. He also reviewed Scott's journal and several of her emails. Brown's role in the investigation was limited to answering Turner's questions; she did not provide him with any written materials. For her own part, Scott admitted to Turner that she had engaged in the conduct that had led to the charges against her, and she conceded that she was fully aware of the policies, procedures and rules governing the use of County property□ particularly those prohibiting harassment and discrimination and accessing databases for personal or non-business related reasons. She said, however, that she did not know her behavior violated any of these rules and claimed that Hogue knew about and had authorized many of her actions.

At the conclusion of his investigation, Turner produced a report to Fuller detailing his findings and recommending that all of the charges against Scott be sustained. Fuller sent a letter to Scott describing the report's findings and, after meeting with Scott to provide her with an opportunity to explain her actions, decided to terminate her employment. Fuller testified that although Scott's journal was the reason

she decided to initiate the investigation, she based her decision to fire Scott on all of the evidence that Turner procured during [556 F.3d 802] his investigation. As detailed in her termination letter to Scott, Fuller "removed" certain charges but nevertheless concluded that the remainder of the sustained charges misusing County property, conducting personal business on County time, accessing other employees' emails and documents and engaging in workplace harassment and prejudicial acts-warranted Scott's termination. The magnitude of Scott's misconduct was on a scale that was completely different from what Fuller had seen in other employees and destroyed her ability to trust Scott to uphold DCJ's policies in the future. Throughout her trial testimony, Fuller reiterated that Brown played no role in her decision to fire Scott. Scott did not produce any evidence to the contrary.

Scott brought a retaliatory discharge lawsuit in federal district court against the County and Brown, alleging she was wrongfully terminated because she had filed the BOLI complaint and openly criticized both DCJ and Brown, and claiming these were protected activities under the First Amendment and 42 U.S.C. § 1983 as well as under Oregon's Whistle-blower Act. After Brown moved unsuccessfully for summary judgment, a jury found in Scott's favor and awarded her economic damages of $140,000, noneconomic damages of $10,000 and punitive damages of $500,000. The district court denied Brown's motion for JMOL and this timely appeal followed.□

STANDARD OF REVIEW

"We review the denial of a motion for a judgment as a matter of law de novo." Ostad v. Oregon Health Sci. Univ., 327 F.3d 876, 881 (9th Cir.2003). We view the evidence in the light most favorable to the party in whose favor the jury returned a verdict and draw all reasonable inferences in her favor. See id.; Gilbrook v. City of Westminster, 177 F.3d 839, 847-48 (9th Cir.1999). "Judgment as a matter of law is proper when the evidence permits only one reasonable conclusion and the conclusion is contrary to that reached by the jury." Ostad, 327 F.3d at 881. Nevertheless, a reasonable inference "cannot be supported by only threadbare conclusory statements instead of significant probative evidence." Barnes v. Arden Mayfair, Inc., 759 F.2d 676, 680-81 (9th Cir.1985) (internal quotation marks omitted); see also Genthe v. Lincoln, 383 F.3d 713, 716 (8th Cir.2004) (noting within the context of a motion for JMOL that an inference is reasonable "when it may be drawn from the evidence without resort to speculation" (internal quotation marks omitted)); Willis v. Marion County Auditor's Office, 118 F.3d 542, 545 (7th Cir.1997) (noting within the context of a motion for JMOL that a "mere scintilla is not enough" to sustain a verdict for the prevailing party).□ Consequently, [556 F.3d 803] JMOL is appropriate when the jury could have relied only on speculation to reach its verdict.

I.

"To state a First Amendment claim against a public employer, an employee must show: (1) the

employee engaged in constitutionally protected speech; (2) the employer took 'adverse employment action' against the employee; and (3) the employee's speech was a 'substantial or motivating factor for the adverse action.'" Marable v. Nitchman, 511 F.3d 924, 929 (9th Cir.2007) (quoting Coszalter v. City of Salem, 320 F.3d 968, 973 (9th Cir.2003), citing Bd. of County Comm'rs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668, 675, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996)); see also Garcetti v. Ceballos, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977); Settlegoode v. Portland Pub. Sch., 371 F.3d 503, 510 (9th Cir. 2004). "If the plaintiff makes those showings, then the burden shifts to the defendant to show 'by a preponderance of the evidence that it would have reached the same decision ... even in the absence of the [plaintiff's] protected conduct.'" Gilbrook, 177 F.3d at 854 (quoting Mt. Healthy, 429 U.S. at 287, 97 S.Ct. 568).

Brown expressly assumed in her appellate briefs that Scott's BOLI complaint was protected speech.[6] Scott's termination plainly qualifies as an adverse employment action. See Umbehr, 518 U.S. at 675, 116 S.Ct. 2342; Ray v. Henderson, 217 F.3d 1234, 1237 (9th Cir.2000). Thus the first two prongs of Mt. Healthy's *prima facie* test are not at issue. Instead, Brown argues that Scott's protected conduct was not a "substantial or motivating factor" in her termination, which would have occurred even in the absence of this conduct, because even assuming that the jury could have reasonably found that Brown

harbored animosity toward Scott, Fuller made the final and independent decision to terminate Scott.

We have assessed the liability of a subordinate supervisor who was not the final decision maker under Mt. Healthy's "substantial or motivating" standard as well as its mixed motive approach. Compare Ostad, 327 F.3d at 882-83 (analyzing facts [556 F.3d 804] under "substantial or motivating" standard), with Gilbrook, 177 F.3d at 853-56 (analyzing facts under mixed motive standard). Under either rubric, however, the focus is on the question of causation. See Ostad, 327 F.3d at 882-83 (relying on Gilbrook in its analysis); Gilbrook, 177 F.3d at 855 (citing opinions addressing *prima facie* cases of discrimination in its analysis). Causation is the dispositive issue here as well. Consequently, the critical questions are: (1) whether a final decision maker's independent investigation and termination decision, responding to a biased subordinate's initial report of misconduct, can negate any causal link between the subordinate's retaliatory motive and an employee's termination; and, if so, (2) whether the record here compels the conclusion that Fuller conducted an independent investigation and made a wholly independent decision to terminate Scott such that Brown cannot be held liable for causing her to be fired.

In Gilbrook, we established that a "subordinate cannot use the non-retaliatory motive of a superior as a shield against liability if that superior never would have considered a dismissal but for the subordinate's retaliatory conduct." 177 F.3d at 855. We expressly declined, however, to decide "what the result should be, as a matter of law, if the facts

showed that the final decision-maker made a wholly independent, legitimate decision to discharge the plaintiff, uninfluenced by the retaliatory motives of a subordinate." Id.; see also Ostad, 327 F.3d at 883. The record before us requires us to answer this heretofore open question.

II.

Most of this circuit's retaliatory motivation jurisprudence has arisen from cases in which the issue has been whether the final decision maker was liable because she was retaliating against the employee or her decision was tainted by the retaliatory motivation of a subordinate. See, e.g., Poland v. Chertoff, 494 F.3d 1174 (9th Cir.2007). In the latter situation, the subordinate's unlawful motivation has been imputed upstream to the final decision maker. In the present case it is the supposedly biased subordinate, Brown, who is herself being charged with liability. Nonetheless, these "upstream imputation" cases are relevant to our analysis. See Gilbrook, 177 F.3d at 855 (citing imputation cases in its discussion of subordinate liability).□ If a final decision maker is not liable when her decision to terminate a plaintiff is sufficiently independent from a subordinate's unlawful motive, the circumstance proving that independence may also show that the subordinate did not cause the plaintiff's termination.

Gilbrook, in specifically addressing a subordinate supervisor's liability, did observe that as a general matter the nature of § 1983 liability is such that "the `requisite causal connection can be established not only by some kind of direct personal participation in

the [termination], but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.'" 177 F.3d at 854 (citing and quoting Johnson [556 F.3d 805] v. Duffy, 588 F.2d 740, 743-44 (9th Cir.1978) (holding sheriff could be liable for his omission to perform duties imposed by state law that deprived the plaintiff of his property without due process)). This general principle, as applied within the context of the employment setting, cannot be taken so literally as to convert into a constitutional tort a subordinate supervisor's mere participation in, while performing her normal supervisory responsibilities, the initiation of a disciplinary process that results in an employee's otherwise appropriate and lawful termination. As we recognized in Gilbrook itself, a superior's nonretaliatory employment decision "does not automatically immunize a subordinate against liability for her retaliatory acts"; subordinate liability instead turns on the "intensely factual" determination of whether the superior never would have made this decision "but for the subordinate's retaliatory conduct." 177 F.3d at 854-55 (emphasis added).

Here, it is not clear that Scott relies on Brown's role in bringing the journal to Fuller's attention or her participation in the administrative leave decision as alone sufficient to support the jury's verdict finding Brown liable for Scott's termination.9 Even if we consider those events, however, the evidence negates any inference that Fuller would not have taken any action against Scott but for Brown's retaliatory motivations. The journal surfaced in a

workplace investigation of possible employee misconduct, and several DCJ employees became aware of its existence contemporaneously with Brown. Brown was engaged in activities typical and appropriate for her position when she became aware of the journal. The journal itself was accidentally discovered during an investigation of another employee's conduct, and Scott did not allege that Brown targeted her for investigation or selectively reported her misconduct.[10] Brown was at most a part of a process that included several other employees who were focused on disciplining violations of workplace rules and policies. Given the numerous potential rules violations revealed in the journal and the actions taken by the human resources department, it is unreasonable to conclude that Fuller - who had already initiated the inquiry into another employee's misuse of emails - would not have been informed of or reacted to the journal but for Brown's animus against Scott.

Given the evidence that Fuller made an independent, principled decision for her own reasons to investigate and eventually terminate Scott, there was by definition no "constitutional injury." Id. at 854. Scott was terminated for violating County and DCJ rules through actions she admitted she had committed. As we emphasized in Gilbrook, "[w]e do not hold that a final decision-maker who lacks any improper motive never can absolve a subordinate of liability for his or her retaliatory acts, any more than we hold that such a decision-maker [556 F.3d 806] always can absolve the subordinate." 177 F.3d at 855 (emphasis in original). On the facts of this case, where the evidence shows "that the final decision-

maker made a wholly independent, legitimate decision to discharge the plaintiff, uninfluenced by the retaliatory motives of" Brown, we hold that the neutrality of the decisionmaking process eliminated any "causal" link to Brown's bias. Id.

A recent "upstream" case in which a biased subordinate's involvement in an adverse employment action rose to the level of tainting the final decision to terminate is illustrative. See Poland, 494 F.3d 1174. Poland held that the Custom Service's administrative investigation of the supervisor's retaliatory charges did not "shield[]" the Customs Service from imputed liability because "the allegedly independent adverse employment decision was not actually independent" due to the subordinate supervisor's significant involvement in the decisionmaking process. Id. at 1182. We held that while an initiation of an investigation would not "on its own" be enough to impute a subordinate's animus, the biased subordinate "had a pervasive influence on the administrative inquiry that led to the adverse employment action." Id. at 1183. The supervisor specifically requested the investigation, sent a lengthy memo and supporting documentation outlining numerous incidents of the plaintiff's alleged malfeasance and provided the list of 21 witnesses who were contacted during the investigation. See id.; see also Dominguez-Curry v. Nevada Transp. Dep't, 424 F.3d 1027, 1032-33, 1039-40 (9th Cir.2005) (imputing animus in a Title VII failure-to-promote claim when the subordinate was one of two employees who interviewed and ranked the petitioner); Perez v. Curcio, 841 F.2d 255, 258 (9th Cir.1988) (imputing animus in an age

discrimination action when the final decision maker relied on reports written by the subordinate both in initiating the investigation and ultimately in demoting the plaintiff).11 We have likewise affirmed the liability of subordinates when they wielded a similarly significant degree of influence over the final decision maker's adverse employment decision. For example, in Gilbrook, we held that a final, unbiased decision maker did not eliminate the liability of two subordinates where the subordinates had "participated directly" in a multitiered termination process. Gilbrook, 177 F.3d at 853. There, one subordinate was the "driving force" behind the investigation of the terminated [556 F.3d 807] employees and made the initial decision to terminate them. The second subordinate then conducted hearings on the employees' appeals and affirmed the terminations. We held that a third and final decision maker with the power to ratify, reject or modify the termination decisions did not cut off the liability of the biased subordinates because there was evidence that the employees would not have been disciplined but for the subordinates' actions in bringing the charges in the first place. See id. at 850-51, 853; see also Ostad, 327 F.3d at 883 (holding subordinate liable when he provided the primary source of information on which the final decision maker "substantially relied ... to reach the decision to terminate").

The facts before us here show a workplace in which the initial report of possible employee misconduct came from a presumably biased supervisor, but whose subsequent involvement in the disciplinary process was so minimal as to negate any

inference that the investigation and final termination decision were made other than independently and without bias. We must not "place an employee in a worse position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing.'" Gilbrook, 177 F.3d at 855 (citing Mt. Healthy, 429 U.S. at 285, 97 S.Ct. 568). But concomitantly the Supreme Court has admonished that we must not "place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing .... [T]hat [employee] ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record...." Mt. Healthy, 429 U.S. at 285-86, 97 S.Ct. 568.

III.

With the foregoing principles and spectrum of cases as our guide, and recognizing "that the ultimate question of the subordinate's liability `is an intensely factual one, the results of which will vary depending on the circumstances,'" Ostad, 327 F.3d at 883 (quoting Gilbrook, 177 F.3d at 855), we hold that Brown cannot be found liable based on her limited involvement in the chain of events that ultimately led to Scott's termination. The jury could have reasonably found that Brown was involved in initiating the investigation of Scott after the discovery of her journal and in the decision to place her on administrative leave. But neither Brown's role in the events leading up to the investigation nor the evidence of her participation in that inquiry rises to the level of involvement in or influence on Fuller's

termination decision that would allow the jury reasonably to find that Brown's animus was a "`substantial' or `motivating' factor" in Fuller's decision to fire Scott. Gilbrook, 177 F.3d at 853-54 (quoting Mt. Healthy, 429 U.S. at 287, 97 S.Ct. 568). Instead, the record of Fuller's independent actions and judgments compels the conclusion that she was not influenced by any retaliatory motive on Brown's part.

As to the discovery of Scott's apparently improper journal that triggered the inquiry into her conduct, it is relevant that Brown became aware of the document only incidentally through an investigation of another employee initiated by Fuller and the human resources department. Moreover, although Brown was present at the meeting where, according to standard practice, it was decided that Scott would be placed on administrative leave pending the investigation, that decision did not make Scott's termination a foregone conclusion. Instead, senior management, aware of Scott's apparent misconduct, pursued an inquiry into the alleged violations. There is no evidence that but for Brown, Fuller would [556 F.3d 808] have ignored the journal and let the matter drop. That other DCJ employees, including the human resources manager, became aware of and reacted to the journal suggests the very opposite. Accordingly, the relevant question remains whether Brown improperly influenced the subsequent investigation or the decision to terminate Scott itself such that she can be held liable for Fuller's decision. On this record, the only reasonable finding is that she did not.[12]

There is no evidence that Brown outlined possible reasons for Scott's discharge or recommended her termination, either at the initial meeting or thereafter. Cf. Gilbrook, 177 F.3d at 850, 853-55; Ostad, 327 F.3d at 880, 883. To the contrary, Umbras outlined potential violations Turner was to investigate, and it was Turner who recommended at the conclusion of his investigation which charges should be sustained. Scott asks us to hold that a reasonable juror could have inferred that Brown "was the investigation" because (1) Scott's computer was placed in Brown's office after Scott was placed on administrative leave and (2) Williams completed the follow up research ordered by the human resources department "to see if ... there were any other e-mails from [Scott] or jobs or anything else that pertained to her" while Turner was still conducting his investigation. Scott appears to argue that these circumstances alone permitted the jury to find that Brown was an influential player in Turner's investigation who searched for and provided documentary evidence that actually led to Scott's termination. But such an inference would be pure speculation, as Scott presented no evidence that Brown discovered any information from Scott's computer or from Williams, much less that she provided any such information to Turner or Fuller. Significantly, Scott deposed Williams but neither introduced her deposition testimony nor called her as a witness to tell the jury what, if anything, she had turned over to Brown. Scott's suppositions are "only threadbare conclusory statements" that cannot support a reasonable inference that Brown influenced the decision to terminate Scott. Cf.

Barnes, 759 F.2d at 680-81 (internal quotation marks omitted). Instead, the record shows that Brown played a very limited role in the investigation. She did not provide a witness list or any documentary evidence during Turner's investigation, and there is no evidence that Brown told Turner anything inappropriate during their interview. Cf. Poland, 494 F.3d at 1183. Nor did the investigation "substantially rel[y]" or "depend[] heavily" on Brown, who was one of 22 witnesses Turner interviewed. Cf. Ostad, 327 F.3d at 880, 883 (holding subordinate liable when the decision maker "depended heavily" on his testimony, which "took up 217 pages of the hearing's 403-page transcript"); Stacks v. Sw. Bell Yellow Pages, Inc., 27 F.3d 1316, 1323 (8th Cir.1994) (noting a final decision maker cannot escape liability when the facts on which he "rel[ies] have been filtered" by a subordinate with illegitimate motives). Brown's minimal participation was too limited and constrained to have tainted the investigative process, particularly when it was part [556 F.3d 809] of Brown's job to cooperate with Turner's inquiry.

Fuller's substantial role in the process that resulted in Scott's termination is as important as Brown's minimal participation. Fuller authorized the thorough investigation of the charges against Scott. Once she received Turner's report, she critically examined its contents, meeting with Scott to allow her to present any mitigating evidence and ultimately rejecting two of Turner's recommendations. Scott herself admitted, "I actually thought that she was listening, and she said she would consider everything." As outlined in the

termination letter composed and signed by Fuller, in the final analysis she fired Scott for violations of formal work rules, executive orders and contractual agreements. Scott admitted she was fully aware of these policies and rules, and both Fuller and Umbras emphasized that they had never before seen violations of this magnitude. Under these circumstances, no reasonable juror could have concluded that the investigative process was a "sham or conduit" for Brown's animosity or that Fuller was "duped" into terminating Scott. Willis, 118 F.3d at 547-48. To the contrary, the record shows that Fuller's decision was based on her own analysis that "was not jaded by anyone else's subjective and possibly [illegitimate] evaluation." Id. at 547. Accordingly, we hold that, as a matter of law, Fuller's "wholly independent, legitimate decision to discharge [Scott], uninfluenced by the retaliatory motives of a subordinate" prohibited the jury from finding Brown liable for Scott's termination. Gilbrook, 177 F.3d at 855.

Finally, practical considerations also animate our conclusion. As discussed above, all aspects of Brown's limited involvement in this case were at the express direction or under the authority of her superiors in the management structure. To say that the County's investigative process was fatally and irrevocably tainted by Brown's overall limited involvement would stymie legitimate corporate management and discipline, which must necessarily involve and rely upon supervisory staff. Cf. City of San Diego v. Roe, 543 U.S. 77, 125 S.Ct. 521, 160 L.Ed.2d 410 (2004) (noting the "common-sense realization that government offices could not

function if every employment decision became a constitutional matter"); Brooks v. City of San Mateo, 229 F.3d 917, 928 (9th Cir.2000) (limiting the type of behavior that constitutes an adverse employment action based on the concern "that employers will be paralyzed into inaction once an employee has [engaged in protected conduct], making such [conduct] tantamount to a `get out of jail free' card for employees engaged in job misconduct"). Absent evidence that a supervisor abuses her participation to advance a retaliatory agenda, we decline to endorse such a result in this case.

CONCLUSION

On the evidence presented to the jury, we hold as a matter of law that Fuller's wholly independent decisionmaking negated any causal connection between Brown's retaliatory bias and Scott's termination. Brown therefore is not liable for any damages Scott suffered as a result of her discharge, and the district court incorrectly denied Brown's motion for a JMOL. We reverse the court's judgment and remand for entry of judgment for Brown.

REVERSED and REMANDED.

Notes:

* The Honorable Judith M. Barzilay, United States Court of International Trade, sitting by designation.

1. The district court ultimately dismissed all of the claims against the County, which are not at issue in this appeal.

2. We view the evidence in the light most favorable to the party in whose favor the jury returned a

verdict and draw all reasonable inferences in her favor. See Settlegoode v. Portland Pub. Sch., 371 F.3d 503, 507 (9th Cir.2004); Ostad v. Or. Health Sci. Univ., 327 F.3d 876, 881 (9th Cir.2003).

3. Brown again assigned the search to Williams, who gathered some additional information within weeks. On this timetable, Williams would have completed her assignment while the investigation discussed below was in progress. Scott did not call Williams as a witness and there is no evidence about what this additional information included, whether Brown herself ever received it and, if so, whether she passed it on to her superiors.

4. On appeal, Brown also challenges (1) the district court's denial of her motions for summary judgment and to exclude Landis' testimony and (2) the award of punitive damages. Because we reverse the denial of JMOL, we do not reach the denial of Brown's motion in limine or the question of punitive damages. We do not review the district court's pretrial denial of Brown's motion for summary judgment because "[t]he denial of a motion for summary judgment is not reviewable on an appeal from a final judgment entered after a full trial on the merits." Locricchio v. Legal Servs. Corp., 833 F.2d 1352, 1359 (9th Cir. 1987); see also Price v. Kramer, 200 F.3d 1237, 1243 (9th Cir.2000). Finally, we deny Brown's request that we ignore Scott's supplemental excerpt of record. "Although not models of compliance with the Rules, [Scott's] ... excerpts of record are sufficient to apprise this court of the relevant issues before it." Dominguez-Curry v. Nev. Transp. Dep't, 424 F.3d 1027, 1033 n. 2 (9th Cir. 2005).

5. Although Barnes analyzed a summary judgment motion, the Supreme Court has explained that the inquiry under summary judgment and JMOL motions is in essence the same. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

6. We deny Brown's subsequent request for a remand in light of Garcetti, 547 U.S. at 421, 126 S.Ct. 1951, in which the Supreme Court held that "when public employees make statements pursuant to their official duties, ... the Constitution does not insulate their communications from employer discipline." Brown's motion for JMOL neither challenged nor reserved the issue of protected speech for appeal. "It is well-established that an appellate court will not consider issues that were not properly raised before the district court." Doi v. Halekulani Corp., 276 F.3d 1131, 1140 (9th Cir.2002) (internal quotation marks omitted).

7. We limit the scope of our inquiry to Scott's ultimate termination. Although being placed on administrative leave might qualify as an adverse employment action and we have suggested an investigation of an employee might so qualify, see, e.g., Poland v. Chertoff, 494 F.3d 1174, 1180 (9th Cir.2007); Ulrich v. City and County of San Francisco, 308 F.3d 968, 977 (9th Cir.2002), Scott neither argued these theories in the district court nor in her briefs on appeal, consistently stating that her retaliatory conduct claim was based solely on her discharge. Accordingly, we do not consider whether initiating the inquiry into Scott's activities or placing her on administrative leave were themselves adverse

employment actions for which Brown could be held liable independent of Scott's termination.

8. Claims brought under Title VII and the Age Discrimination in Employment Act apply a different burden shifting framework than § 1983 claims, and we do not intimate that these cases are controlling here. See Poland, 494 F.3d at 1180 n. 1; Freitag v. Ayers, 468 F.3d 528, 543 n. 9 (9th Cir.2006); Allen v. Iranon, 283 F.3d 1070, 1074-75 (9th Cir. 2002). Rather, we cite these cases for their informative discussions about causation. See Gilbrook, 177 F.3d at 855 (analyzing a § 1983 retaliation claim but discussing Title VII retaliation and discrimination cases for their analysis of causation).

9. See n. 8, supra.

10. Judge Berzon says she does not see a difference between "targeting someone for investigation and retaliating against them by reporting them." Concurrence at 1743. What we mean is that Scott did not claim that Brown selectively enforced employee regulations only against her, while ignoring violations by other employees. Nor did Scott show that Brown monitored her behavior more closely in the hopes of reporting her for misconduct; indeed, Brown found Scott's journal in the course of investigating another employee. This distinction is relevant in showing that Scott's misconduct was not brought to Fuller's attention solely because of Brown's animus such that Fuller never would have made the termination decision but for Brown's conduct. See Gilbrook, 177 F.3d at 854-55.

11. Compare, e.g., Gee v. Principi, 289 F.3d 342, 346-47 & n. 4 (5th Cir.2002) (holding evidence of subordinates' animus precluded summary judgment

regarding the final decision maker's liability when the subordinates "made comments critical" of the plaintiff at "the critical meeting" with the final decision maker and a third party who was present at the meeting "stated that it was his impression that by the end of the meeting, the negative statements had created a general consensus that [the petitioner] would not be selected"); Griffin v. Washington Convention Ctr., 142 F.3d 1308, 1311 (D.C.Cir.1998) (holding evidence of subordinate's animus relevant to final decision maker's liability when he "was [the decision maker's] chief source of information regarding [plaintiff's] job performance, repeatedly urged [decision maker] to terminate [plaintiff], ... helped develop the tests used to assess [plaintiff], was responsible for evaluating [plaintiff's] success on those tests, and was in contact with [decision maker] at every significant step of the decisionmaking process"); Long v. Eastfield College, 88 F.3d 300, 307 n. 8 (5th Cir. 1996) (holding evidence of subordinates' animus precluded summary judgment regarding final decision maker's liability when subordinates recommended plaintiffs' termination and directed other employees to prepare written statements presented to final decision maker, and the only explanation plaintiffs received from final decision maker regarding their discharge was that he "made a decision to uphold the recommendation of your supervisor[s] to terminate your employment").

12. Rebecca Hackenberg, another DCJ employee, testified that she told Hogue the administrative leave "sure seems like retaliation about that BOLI complaint, doesn't it?", and that Hogue "kind of

looked sideways out of the window, and went, 'yeah.'" This testimony does not establish Brown's liability for Scott's termination. First, Hackenberg did not mention Brown throughout her entire testimony, let alone implicate her as a source for the alleged retaliation. Second, as we have noted, the administrative leave did not make Scott's termination a foregone conclusion.

BERZON, Circuit Judge, concurring in the judgment:

Although I concur in the result of this case, I do not agree with the majority's conclusion that there was insufficient evidence from which a reasonable jury could have found that Brown's retaliatory animus [556 F.3d 810] was a "substantial or motivating factor," see Gilbrook v. City of Westminster, 177 F.3d 839, 853 (9th Cir.1999), in Fuller's decision to terminate Scott. As the majority intimates, a supervisor who, with retaliatory intent, selectively reports an employee to a superior is liable for the employee's termination even if the supervisor does not influence the resulting investigation or termination decision. See Maj. Op. at 804-05. In this case, the majority concludes that Brown discovered Scott's journal and reported it to Fuller while "engaged in activities typical and appropriate for her position," and then states that Scott does not allege that Brown "targeted her for investigation or selectively reported her misconduct." See id. But Scott obviously does so allege, she has maintained from the outset□ and the jury must have found□ that Brown reported her to Fuller for a retaliatory reason. The difference between targeting someone

for investigation and retaliating against them by reporting them, knowing they would thereupon be investigated, entirely escapes me. So, the majority can only be holding that any retaliatory animus that Brown harbored against Scott did not motivate her decision to report Scott to Fuller, and that a reasonable jury could not have concluded otherwise.

I disagree. I would hold that Scott met her burden of establishing that Brown's retaliatory animus was a "substantial or motivating factor" in Fuller's decision to terminate Scott. See Gilbrook, 177 F.3d at 853. The majority's implicit conclusion to the contrary□ that Brown was not motivated by retaliatory reasons but was just doing her job□ disregards our mandate to view "the evidence in the light most favorable to the party in whose favor the jury returned a verdict and draw all reasonable inferences in her favor," and fails to accord the required deference to a reasonable jury decision. Maj. Op. at 802 (citing Ostad v. Oregon Health Sci. Univ., 327 F.3d 876, 881 (9th Cir.2003)); see also id. ("Judgment as a matter of law is proper when the evidence permits only one reasonable conclusion and the conclusion is contrary to that reached by the jury.").

Alternatively, the majority can possibly be read as holding that a supervisor, even if motivated by retaliatory animus, may not be held liable for instigating an investigation likely to result in an adverse action, as long as the superior who makes the final decision does so independently. If so, the holding squarely conflicts with Gilbrook, which held to the contrary.

At the same time, the facts of this case indicate that Fuller's investigation would have occurred even without Brown's instigation. I would therefore hold that Brown also met her burden, under part two of the two-part Gilbrook/Mt. Healthy burden-shifting framework, of showing that Scott's discharge would have occurred "even in the absence of the protected conduct." See Gilbrook, 177 F.3d at 854; Maj. Op. at 803, 807-08. My decision to reverse the judgment, in other words, rests on Brown's successful affirmative defense, not on Scott's failure to establish her initial case.

A. The "Substantial or Motivating Factor" Requirement

Under the two-part burden-shifting framework outlined by the Supreme Court in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977), and applied by this Court in Gilbrook, the plaintiff bears the initial burden of demonstrating that her protected conduct was a "`substantial' or `motivating' factor in the defendant's employment decision." Gilbrook, 177 F.3d at 853-54 (quoting Mt. Healthy, 429 U.S. at 287, 97 S.Ct. 568). [556 F.3d 811] Once the plaintiff makes this showing, the burden shifts to the defendant to show "`by a preponderance of the evidence that it would have reached the same decision ... even in the absence of the plaintiff's protected conduct.'" Id. (quoting Mt. Healthy, 429 U.S. at 287, 97 S.Ct. 568).

In this case, as in Gilbrook, the defendant is the supervisor who initially reported the plaintiff's misconduct, not the employer or the individual who

made the ultimate decision to terminate. See Gilbrook, 177 F.3d at 853-54. For this reason, vicarious liability cases such as Poland v. Chertoff, 494 F.3d 1174 (9th Cir. 2007), are, contrary to the majority's reliance on them, not analogous. Those cases are concerned with identifying situations in which it would be equitable to hold an otherwise faultless superior liable for the acts of an admittedly culpable subordinate. See *Speiser et al., The American Law of Torts* § 4:1 ("[Vicarious liability] is an interesting form of social policy adjustment under which, even though a person ... is himself personally without fault, legal public policy renders him nevertheless liable."). As a result, the focus of vicarious liability cases is properly on the actions of the superior, and therefore on whether those actions were tainted by the subordinate's animus.

In addition, vicarious liability cases implicate very different policy considerations than subordinate liability cases, particularly with respect to the protection of an employee's First Amendment rights. In the vicarious liability context, the concern is that, in the absence of a rule imposing vicarious liability, an employer could evade liability by isolating the final decision-maker and, in essence, willfully ignoring the bias of a subordinate. Thus, the inquiry in a vicarious liability case is into whether the superior's investigation and termination decision were truly independent.

By contrast, the concern in a subordinate liability case is that too lenient a standard will permit supervisors deliberately to target individuals who have engaged in protected activity, knowing that their actions will lead superiors lacking retaliatory

animus to harm the individual. The issue is not, in other words, whether the employer is acting with willful ignorance (which an "independent investigation" requirement is good at measuring), but rather whether the subordinate supervisor is deliberately placing the subordinate in the way of harm (which the "independent investigation" requirement only partly measures). Accordingly, as will appear, the inquiry in a subordinate liability case is broader, requiring not only a determination as to whether the investigation and termination decision were influenced by the biased subordinate, but also whether the subordinate initiated those proceedings in retaliation for the employee's protected activity.

The focus in a case such as this one, then, must be on the supervisor's conduct□ specifically on whether that conduct (a) was a "substantial or motivating factor" in the employee's termination, and (b) was motivated by retaliatory animus.

I agree with the majority that, on this record, Brown did not in any substantial way influence Fuller's investigation once it began, or Fuller's ultimate decision to terminate Scott.[1] See Maj. Op. 807-08. [556 F.3d 812] Brown's conduct after she reported the journal to Fuller was therefore not a cause of Scott's termination, regardless of its motivation.

But Brown's lack of participation in Fuller's investigation and decision to terminate does not end the causation inquiry.[2] Rather, we must also consider whether Brown, while acting with retaliatory animus, "set[ ] in motion a series of acts by others which [she knew] or reasonably

should[have known] would cause others to inflict the constitutional injury." See Gilbrook, 177 F.3d at 854 (noting that the "requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury") (quoting Johnson v. Duffy, 588 F.2d 740, 743-44 (9th Cir.1978)); see also *Restatement (Second) of Torts* § 433 (1965) ("The following considerations are ... important in determining whether the actor's conduct is a substantial factor in bringing about harm to another: ... (b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm.").3

It is undisputed that Fuller launched the investigation that led to Scott's termination immediately after Brown presented her with Scott's journal. Because Scott's journal contained significant evidence of misconduct, Brown either knew or should have known that presenting the journal to Fuller would "set[ ] in motion a series of acts" by Fuller that "would cause [Fuller] to inflict the constitutional injury," i.e., to terminate Scott. See Gilbrook, 177 F.3d at 854. As a result, Brown's act of reporting Scott to Fuller was a "cause" of Scott's termination, even though she did not "direct[ly] ... participat[e]" in the ultimate decision to terminate. See Gilbrook, 177 F.3d at 854; see also Restatement (Second) of Torts §§ 433, 441, 442A.[556 F.3d 813]

The majority appears to suggest, however, that Brown's decision to report the journal to Fuller

cannot support Scott's claim, because Brown discovered the journal and brought it to Fuller's attention while she was "engaged in activities typical and appropriate for her position." Maj. Op at 805. As a result, the majority suggests, any retaliatory animus Brown harbored against Scott could not be, as a matter of law, a "substantial or motivating factor" in Scott's discharge. Maj. Op. at 807-08.

Although the evidence could support the majority's interpretation, it does not foreclose the opposite conclusion. See Ostad, 327 F.3d at 881 ("Judgment as a matter of law is proper when the evidence permits only one reasonable conclusion and the conclusion is contrary to that reached by the jury."). "The causal link between a protected activity and the alleged retaliatory action `can be inferred from timing alone' when there is a close proximity between the two." See Thomas v. City of Beaverton, 379 F.3d 802, 812 (9th Cir.2004) (quoting Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1065 (9th Cir.2002)). In this case, Brown reported Scott's journal to Fuller approximately one month after Scott filed her BOLI complaint. This close temporal proximity was probably sufficient evidence on its own to support the jury's conclusion that Brown was motivated by retaliatory animus when she reported Scott. See Thomas, 379 F.3d at 812 (holding that sufficient evidence of causation existed where adverse employment action occurred seven weeks after protected activity); see also Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir.1987) (three month time lapse between protected conduct and alleged retaliatory act provided sufficient evidence of causal connection). In addition, Brown admitted at trial

that Scott's BOLI complaint surprised and upset her, and that she took Scott's allegations personally. Also, Brown was asked to look for other material from Scott, but, before she finished doing so, she reported Scott to Fuller based on the journal alone. These combined facts provided sufficient evidence□ albeit, I concede, not with much room to spare□ from which a reasonable jury could have concluded that Brown's decision to report Scott and thereby set in motion the chain of events that led to Scott's termination was motivated by retaliatory animus, not just routine practice.

Moreover, the majority is wrong if it is suggesting that the fact that Brown's action in bringing the journal to Fuller's attention occurred while "Brown was engaged in activities typical and appropriate for her position," Maj. Op. at 805, precludes the jury's verdict that she nonetheless acted with a retaliatory motive. Supervisors have the power to retaliate precisely because their responsibilities include the authority to take steps that will foreseeably harm their subordinates' employment circumstances. If we absolve supervisors from liability for First Amendment violations whenever they take actions while engaged into their normal responsibilities, then they will almost never be liable, even if the motive for an action challenged was retaliatory.

Here, the jury necessarily found that at least one substantial reason Brown brought the journal to Fuller's attention was that she was angry about the BOLI charge, and, as I have shown, that factual conclusion, although quite debatable, is supported by adequate evidence. That bringing work infractions to Fuller's attention was part of Brown's job does not

negate the finding as a matter of law, any more than a supervisor with the responsibility to hire and fire for rule infractions would be absolved of liability as a matter of law if he fires a subordinate who engages [556 F.3d 814] in speech in part because of that speech.

Because a reasonable jury could have found that Brown acted with a retaliatory motive when she brought Scott's journal to Fuller's attention, and because that act was a substantial and foreseeable link in the causal chain that led to Scott's termination, I cannot agree with the majority that Scott failed, as a matter of law, to show that her protected activity was "a substantial or motivating factor" in her termination.

It is possible that rather than concluding that Brown did not act with a retaliatory intent when she reported Scott to Fuller, the majority is instead holding that, even if Brown acted with a retaliatory motive, Fuller's independent investigation and termination decision absolved Brown of any liability as a matter of law. If so, the majority's holding is in tension with Gilbrook.

In Gilbrook, the plaintiffs-employees sued both their subordinate supervisors and the superior who made the ultimate decision to terminate. Gilbrook, 177 F.3d at 852-53. The jury concluded that "the plaintiffs' protected conduct had played a `substantial or motivating' role in [the subordinate supervisor's] actions against plaintiff, but had not played such a role in the actions of [the superior who made the final decision to terminate]." Id. at 853. Despite the fact that the jury absolved the final decision-maker of liability□ presumably because he

made an independent decision to terminate the court upheld the verdict against the subordinate supervisors. Id. at 855-56. In other words, the fact that the final decision maker acted independently and without a retaliatory motive did not automatically negate the subordinate supervisors' liability for the employees' termination. In fact, the court expressly rejected the argument, made by the subordinate supervisors, that the superior's "legitimate, nonretaliatory motive 'cuts off' the liability of his subordinates" as a matter of law. Gilbrook, 177 F.3d at 853.

B. Brown's Affirmative Defense

Because I would hold that Scott presented sufficient evidence from which a jury could have concluded that her protected conduct was a "substantial or motivating factor" in her termination, I would reach the question whether Brown established the affirmative defense outlined in Mt. Healthy. That defense required Brown to demonstrate, by a preponderance of the evidence, that "the disciplinary action would have been taken against [Scott] even in the absence of the protected conduct." Gilbrook, 177 F.3d at 855 (citing Mt. Healthy, 429 U.S. at 287, 97 S.Ct. 568); see also Ostad, 327 F.3d at 883 (holding a subordinate supervisor liable where the supervisor instigated an investigation, participated actively in that investigation, and failed to prove that the employee "would have been terminated ... even in the absence of his protected speech").[4]

Brown met that burden here. She introduced evidence that the journal initially was uncovered

through an unrelated investigation, instigated by Fuller, of another employee; that Brown herself did not discover the journal; that employees in the human resources department were independently aware of the journal; and that the journal, by virtue of its length and inflammatory content, was likely to attract attention from HR employees and to warrant [556 F.3d 815] a report to senior management. Given that evidence, I would hold that a reasonable jury could only have concluded that Fuller would have learned of the journal, instigated the investigation of Scott and reached the same conclusion even without prompting from Brown, and therefore Scott's termination would have occurred "even in the absence of the protected conduct." See Gilbrook, 177 F.3d at 855.

In sum, I would reverse the jury's verdict under part two, not part one, of the Mt. Healthy burden-shifting framework on the grounds that, based on the facts presented, Fuller's investigation□ and hence Scott's termination□ was inevitable. Such a holding acknowledges the deference we must afford to a reasonable decision by a jury, and avoids placing too great an evidentiary burden on a plaintiff seeking to vindicate her First Amendment rights.

For all these reasons, I concur in the judgment, but not in the majority opinion.

Notes:

1. On page 806, the majority states that a supervisor must have a "significant" influence on a superior's investigation in order for that investigation to have been impermissibly tainted. Maj. Op. at 806. In the next sentence, it quotes a passage from Poland in

which the court noted that the supervisor in that case had "had a pervasive influence on the administrative inquiry that led to the adverse employment action." Id. I do not read the majority's reference to the quoted passage as suggesting that an employee must show that the supervisor had a "pervasive," rather than just a "significant," influence on the superior's investigation. The Poland court's conclusion about the high level of the supervisor's influence was merely a statement about the facts in that case, not a statement of the standard an employee is required to meet. Every time Poland states the generally applicable standard, it excludes the term "pervasive." See, e.g., Poland, 494 F.3d at 1184 ("In summary, we hold that ... the plaintiff must show that the allegedly independent adverse employment decision was not actually independent because the biased subordinate influenced or was involved in the decision or the investigation leading thereto.")

2. The majority's view on this point is not clear. On pages 1734 and 1735, the majority may be suggesting that a biased supervisor who initiates a disciplinary process for retaliatory reasons is not necessarily liable for a constitutional tort. But the passage refers to a supervisor who acts "while performing her normal supervisory responsibilities," thus indicating that the hypothetical supervisor, although generally biased, was acting without a retaliatory motive in instigating the investigation; otherwise she would not have been simply carrying out "her normal supervisory responsibilities."

3. This causation principle is directly analogous to the "intervening force" concept in basic tort law, and

differs critically from the principles that underlie vicarious liability in tort law. An "intervening force" is one which "actively operates in producing harm to another after the [defendant's] negligent act or omission has been committed." See *Restatement (Second) of Torts* § 441. Despite the presence of an "intervening force" in this case, Fuller's investigation and decision to terminate the defendant remains liable to the plaintiff if the defendant "reasonably could have anticipated or foreseen the intervening acts and its consequences." See 3 *Stuart Speiser, Charles Krause, & Alfred Gans, The American Law of Torts* § 11:9 (1986); Restatement (Second) of Torts § 442A.

4. The majority performs this analysis, see Maj. Op. at 1739, but does not acknowledge it as part of Brown's affirmative defense.

FILED
May 12, 2009
Molly C. Dwyer, Clerk
U.S. Court Of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH COURT

LEA LAKESIDE-SCOTT,

Plaintiff - Appellee,

v.

MULTNOMAH COUNTY,

Defendant,

and

JANN BROWN,

Defendant - Appellant.

No. 05-35896

D.C. No. CV-02-01505-MWM

ORDER

Before: FISHER and BERZON, Circuit Judges and BARZILAY, Judge.*

The panel judges voted to deny appellee's petition for panel rehearing. Judges Fisher and Berzon voted

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*The Honorable Judith M. Barzilay, United States Court of International Trade, sitting by designation.

to deny the suggestion for rehearing *en banc* and Judge Barzilay recommend denial of the suggestion for rehearing *en banc*.

The full court has been advised of the suggestion for rehearing *en banc* and no judge has requested a vote on whether to rehear the matter *en banc*. Fed. R. App. P. 35.

Appellee's petition for rehearing and petition for rehearing *en banc*, filed February 26, 2009, is DENIED.

FILED
May 20, 2009
Molly C. Dwyer, Clerk of Court
U.S. Court Of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH COURT

LEA LAKESIDE-SCOTT,
Plaintiff - Appellee,

v.

MULTNOMAH COUNTY,
Defendant,

and

JANN BROWN,
Defendant - Appellant.

No. 05-35896
D.C. No. CV-02-01505-MWM
District of Oregon, Portland

MANDATE

The judgment of this Court, entered 2/12/09, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court

By: Lee-Ann Collins
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LEA LAKESIDE-SCOTT,

Plaintiff,

v.

CIVIL NO. 02-1505-MO
OPINION & ORDER

MULTNOMAH COUNTY
and JANN BROWN,

Defendants.

MOSMAN, J.,

INTRODUCTION

Plaintiff, Lea Lakeside-Scott ("Lakeside-Scott"), claims that her former employer, defendant Multnomah County, and former supervisor, defendant Jann Brown ("Brown"), terminated her in retaliation for disclosing to her immediate supervisor, Monna Hogue ("Hogue"), that: (1) her co-workers were violating published County policies pertaining to use of email and voicemail; (2) Brown favored gay and lesbian employees in hiring and/or promoting; and (3) Brown violated County and non-County funding source policies when awarding service contracts. As a result, in the Amended Complaint, Lakeside-Scott alleges that Multnomah County and Brown violated 42 U.S.C. § 1983 (First

Claim) and Multnomah County violated Oregon's Whistleblower Act (Second Claim). Lakeside-Scott seeks to recover special damages, reinstatement (or, in the alternative, lost future wages and fringe benefits), noneconomic damages, punitive damages, attorney fees, costs, disbursements and a prevailing party fee.

This court has federal question jurisdiction over the federal statutory claim pursuant to 28 U.S.C. § 1331 and §§ 1343(3) & (4) and supplemental jurisdiction over the state law claim pursuant to 28 U.S.C. § 1367. Defendants now move for summary judgment (docket #39). For the reasons that follow, defendants' motion is granted in part and denied in part.

FACTS[1]

The court views the evidence in the light most favorable to the nonmoving party. A review of all other materials submitted by the parties, including affidavits, declarations, and deposition excerpts, reveal the following facts.

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[1] Both parties submitted a concise statement of facts in excess of five pages. L.R. 56.1(d) states in relevant part: "Unless approved by the court in advance, the concise statement may not be longer than five (5) pages. Statements in excess of that amount may be returned by the Court with direction for counsel to further condense the statement." In this instance, I consider both submissions in their entirety.

I. Background

On August 11, 1997, Lakeside-Scott began working as an Information Systems Specialist II in Multnomah County's Department of Community Justine ("DCJ"). Lakeside-Scott's position included staffing the Help Desk, answering computer-related questions, and providing desktop software and hardware support for DCJ employees. Unlike most employees, Lakeside-Scott's position allowed her special administrative rights in accessing Multnomah County's computer system; however, her access was not unlimited.

Lakeside-Scott was not in management and had no supervisory duties. She was represented by Multnomah County Employees Union, Local 88. The union agreement in force during the relevant period permits employee termination "in good faith for cause . . . after the supervisor gives written notice of the action and cause to the employee . . . " (Morf Aff, Ex 10, p. 3). Lakeside-Scott was competent at her job and never formally disciplined.

Lakeside-Scott's direct supervisor was Hogue, Information Systems Supervisor. Hogue reported to Dan Gorton ("Gorton"), Network Services Manager. Gorton, in turn, reported to Brown, Information Technologies Manager Senior, and Brown reported to Joanne Fuller ("Fuller"), Department Director. As Director, Fuller was responsible for establishing the goals and objectives of the department and had the authority to hire and terminate department employees. Fuller did not draft employment policy for Multnomah County.

II. Pre-Termination

Lakeside-Scott alleges the following series of events that she claims, when taken together, amount to a pattern of retaliation.

A. Lakeside-Scott's Journal

In early 1998, Lakeside-Scott began keeping a journal to send to her union representative. This journal became "a continuing project, which at the end [Lakeside-Scott] was preparing for [her] attorney." (Lakeside-Scott Depo, p. 11). In 2000, Lakeside-Scott discovered how to track employee computer misuse of Multnomah County email and was told by Hogue to keep copies of the email. Also in 2000, Lakeside-Scott learned how to access employee calendars that were not password protected.

In early 2001, Multnomah County's server was becoming overloaded. Each employee was instructed to transfer files to a new "archive.pst" file location. When Lakeside-Scott did so, she tested her transfer and "accidentally" discovered 800 email folders. Lakeside-Scott accessed and copied "thousands" of pages from these email folders. The 167-page journal contains references to personal email and calendar excerpts of numerous co-workers, including Lakeside-Scott's supervisors and other managers.

B. Lakeside-Scott's Request for Ergonomic Accommodation

In 1998, Lakeside-Scott began requesting ergonomic accommodation due to her use of tri-focal glasses. Her supervisors attempted but failed to completely address her continued requests for accommodation until August 23, 2001, when Brown immediately approved a request from Gorton to order $1,672 in new ergonomic office equipment. The equipment took six weeks for delivery and was installed on October 17, 2001. This equipment proved to be "great" for Lakeside-Scott. (Lakeside-Scott Depo, pp. 115, 117).

C. Lakeside-Scott's Request for Reclassification

In 1998, prior to the commencement of Lakeside-Scott's employment, an outside consultant conducted an assessment of job classifications within the DCJ Information Services department. Lakeside-Scott's job was reclassified, resulting in an increase in pay for the Information Systems Specialist II position. Dissatisfied with the results of the reclassification study, in late 1998 Lakeside-Scott requested a review of this determination. On January 20, 1999, Lakeside-Scott was notified by letter from Jennifer Huntsman of Multnomah County Classification and Compensation division as follows: "I have reviewed the classification of your position and agree with the original IT Study's results, allocating your position to that of IS Specialist II. The duties of your position have not changed in a way to warrant reallocation to a different classification." (Morf Ex 1□, p.1).

Lakeside-Scott also complained to Brown about this reclassification determination. However, because Lakeside-Scott had previously filed a union

request, Brown was "dismissive," stating that the reclassification decision had been made and that "if [Lakeside-Scott] wasn't happy . . . [then she] had alternative choices." (Lakeside-Scott Depo, pp. 127, 144-47; Complaint ¶ 9(e)). Brown did not articulate any "alternative choices," but Lakeside-Scott interpreted Brown's statement as an attempt to get Lakeside-Scott to leave Multnomah County employment.

D. Lakeside-Scott's Promotional Opportunities

Lakeside-Scott applied for promotional opportunities in the Department on five occasions: twice in 1998, twice in 1999, and once in May 2001. Lakeside-Scott does not know why she was not selected in the 1998 and 1999 promotional processes. However, she was informed that she was not promoted in May 2001 to the Network Analysis Position because of her lack of follow-through on projects.

> There were separate screenings for this position. First, management conducted an examination, which consisted of reviewing written materials and scoring it based on the criteria provided. [Lakeside-]Scott received a ranking of number five out of five candidates. Next, a panel of employees who worked outside of the department interviewed the candidates. The panel ranked [Lakeside-]Scott number one out of five candidates. Based upon previous experience with [Lakeside-]Scott's inability to take the initiative and follow through on assigned projects, management decided to promote another employee within the divisions.

(Supp. Aff. of Lakeside-Scott, Ex 11, p. 8).

Brown accepted Gorton and Hogue's recommendation to promote an applicant other than Lakeside-Scott.

E. Task's Outside Lakeside-Scott's Classification

In 1998, Lakeside-Scott was directed to perform tasks outside of her classification. However, tasks such as server checks and training were within her area of expertise and Lakeside-Scott was "happy" to do these tasks. (Lakeside-Scott Depo, pp. 137, 144).

F. Lakeside-Scott's Complaints

Lakeside-Scott communicated with Hogue, orally and in writing, on numerous occasions about her dissatisfaction with the conditions of her employment. For example, she frequently complained to Hogue about hiring and promotional practices, including Brown's propensity to hire lesbian and gay employees. Also, Lakeside-Scott often complained to Hogue that she believed other Multnomah County employees were violating work policies with regard to the use of computers and equipment. Hogue advised Lakeside-Scott to keep a record of alleged work policy violations. Also during this time, she further complained to Hogue that Brown was inappropriately awarding service contracts. She frequently discussed these inappropriate practices with co-workers and generally "believed [she] was being treated differently." (Id. at pp. 104-09).

Hogue discussed with Gorton on "numerous occasions" Lakeside-Scott's dissatisfaction and complaints, but did not discuss Lakeside-Scott's complaints with Brown or Fuller. (Hogue 31(a) Responses, pp. 5-6). However, Gorton discussed with Brown Lakeside-Scott's complaints that she was being treated unfairly.

G. Other Events

Brown was dismissive at least once towards Lakeside-Scott in her attempt to contribute or participate in meetings. Hogue and Gorton made Lakeside-Scott uncomfortable by requiring her to keep a record of what she was doing from 6-8:00 a.m., implying that her early morning shift would be eliminated. Also, Hogue and Gorton singled out Lakeside-Scott, advising her to discontinue computer use and work time for her volunteer project even though other employees constantly used their work computers for personal use during work time. Hogue suggested that Lakeside-Scott seek counseling and assisted in the paperwork necessary to initiate counseling, and then later made a "caustic comment" about Lakeside-Scott's counseling appointment.

Subsequently, on October 2, 2001, Lakeside-Scott filed a Complaint with the Oregon Bureau of Labor and Industries ("BOLI"). On November 9, 2001, Lakeside-Scott emailed 123 pages of her journal to a coworker, stating "Here you go" (Morf Aff, Ex 18).

III. Investigation

On November 20, 2001, Fuller learned that Lakeside-Scott had accessed email and calendars of other employees and immediately initiated an investigation and ordered Brown to place Lakeside-Scott on paid administrative leave. The "minute" Lakeside-Scott was notified that she was on administrative leave, Gorton and Rich Scott walked Lakeside-Scott back to her desk and she "quickly hit delete" of the version of the journal she had previously emailed to her coworker from the desktop of her Multnomah County computer. (Lakeside-Scott Depo, pp. 26-27).

On December 5, 2001, Fuller informed Lakeside-Scott that the following disciplinary charges were being considered: misusing Multnomah County property; conducting personal business on Multnomah County time; interfering with the work of others; inappropriately accessing email and calendars of other employees; and engaging in prohibited workplace harassment.

Fuller assigned John Turner ("Turner"), DCJ Interal Affairs Investigator, to investigate. Turner interviewed 22 employees, including Lakeside-Scott, and reviewed various written documents, including the journal. Lakeside-Scott admitted to Turner that she: (1) accessed email and calendars of coworkers and management during work hours; (2) created a journal for her attorney; (3) created approximately 50% of the journal during work hours and on Multnomah County equipment; (4) printed the journal using Multnomah County equipment; and (5) forwarded the journal to a coworker. Turner issued an investigation report on December 19, 2001, recommending that all charges be sustained.

IV. Lakeside-Scott's Termination

By letter dated December 28, 2001, Fuller notified Lakeside-Scott of the investigation results. On January 4, 2002, Fuller met with Lakeside-Scott and the Chief Union Steward. At the brief meeting, Fuller allowed Lakeside-Scott to rebut the charges and offer mitigating circumstances, but Lakeside-Scott only encouraged Fuller to listen to the tape of the investigation interview.

On January 30, 2002, Fuller issued a letter of termination, effective February 14, 2002, for misuse of Multnomah County property; inappropriately accessing email, documents and calendars of other employees; conducting personal business on Multnomah County time; and engaging in prohibited workplace harassment and prejudicial acts. Fuller noted that: "the totality of your actions and conduct warrant your termination. I don't see any way that I can trust you in the future to uphold and support County and Department policies and rules." (Morf Aff, Ex 5, p. 3).

DISCUSSION

Defendants seek summary judgment on both the Section 1983 claim (First Claim) and Oregon's Whistleblower Act claim (Second Claim) on the basis that: (1) the Section 1983 claim against Multnomah County fails because there is no evidence of a custom, policy, or practice or ratification of any unconstitutional act; (2) Lakeside-Scott cannot establish a *prima facie* case for a Section 1983 claim

against Brown for violating Lakeside-Scott's First Amendment rights, as she would have been terminated for misconduct irrespective of any speech; and (3) Lakeside-Scott cannot establish a *prima facie* case for whistleblowing and cannot prove pretext. For the reasons set forth below, summary judgment is granted on the Section 1983 claim against Multnomah County (First Claim), denied on the Section 1983 claim against Brown (First Claim), and denied on the Whistleblower Act claim against Multnomah County (Second Claim).

I. Section 1983 Claim Against Multnomah County (First Claim)

In her first claim, Lakeside-Scott alleges a violation of Section 1983 due to Multnomah County's retaliation against her for engaging in protected speech. Specifically, Lakeside-Scott asserts that Multnomah County had a "custom, policy and practice" to "harass and retaliate against employees like [Lakeside-]Scott, who objected to the conduct of Brown. Brown's conduct was ratified by the County due to its acquiescence to it." (Amended Complaint, ¶ 18).

A. Legal Standards

A governmental entity, such as Multnomah County, cannot be held vicariously liable for the unconstitutional acts of its employees, such as Brown, based upon a *respondeat superior* theory. Monell v. Dep't of Social Servs. of the City of New York, 436 U.S. 658, 691 (1978). Instead, the plaintiff

must "demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged." Bd. of County Comm'rs v. Brown, 520 U.S. 397, 404 (1997). To impose Section 1983 liability against a governmental entity, a plaintiff must rely on one of three theories:

> First, the plaintiff may prove that a city employee committed the alleged constitutional violation pursuant to a formal governmental policy or a longstanding practice or custom which constitutes the standard operating procedure of the local governmental entity. Second, the plaintiff may establish that the individual who committed the constitutional tort was an official with final policymaking authority and that the challenged action itself thus constituted an act of official governmental policy. . . . Third, the plaintiff may prove that an official with final policy-making authority ratified a subordinate's unconstitutional decision or action and the basis for it.

Trevino v. Gates, 99 F.3d 911, 918 (9th Cir. 1996), cert. denied, 520 US 1117 (1997) (citing Gillette v Delmore, 979 F.2d 1342, 1346-47 (9th Cir 1992)).

B. Analysis

Lakeside-Scott seeks to hold Multnomah County liable based on the first and third of these theories. First, she argues that Multnomah County has a

custom, policy or practice of retaliating against employees who "object[] to the conduct of Brown." (Amended Complaint, ¶¶ 17-18). Lakeside-Scott offers her own experience to demonstrate a "department-wide" practice.

Governmental entities cannot be liable without more than one incident of a constitutional violation of a non-policy maker. Davis v. City of Ellensburg, 869 F.2d 1230, 1233-34 (9th Cir. 1989). Moreover, a Section 1983 claim against a municipality "must be founded upon practices of sufficient duration, frequency, and consistency, [such] that the conduct has become a traditional method of carrying out policy" and "may not be predicated on isolated or sporadic incidents." Trevino, 99 F.3d at 918. Proof of random acts or isolated events are insufficient to establish a custom. Thompson v. City of Los Angeles, 885 F.2d 1439, 1443-44 (9th Cir. 1989).

Lakeside-Scott has failed to show how the alleged retaliation for objecting to Brown's conduct arises to a "traditional method of carrying out policy" of Multnomah County. At most, this is nothing more than an "isolated or sporadic incident." Moreover, Multnomah County followed its termination policy by notifying Lakeside-Scott of the contemplated discipline, including the administrative leave, investigation and results thereof, and the final termination decision. Lakeside-Scott has provided no evidence demonstrating a policy at Multnomah County of harassment or retaliation. Therefore, a Section 1983 claim against Multnomah County based on a theory of custom, policy, or practice fails as a matter of law.

Lakeside-Scott also argues that the Multnomah County Board of Commissioners ratified Brown's conduct by acquiescence. Ratification only occurs when the authorized policymaker "approve[s] a subordinate's decision and the basis for it." City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988). Therefore, to establish her ratification theory, Lakeside-Scott must prove that the authorized policymaker of Multnomah County not only approved Fuller's termination of Lakeside-Scott, but also did so on a retaliatory basis. An official to whom final authority has been delegated is considered a policymaker. Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986).

Lakeside-Scott contends that the Board of County Commissioners is the final policymaker for employment policy decisions at Multnomah County and acquiesced to Brown's unconstitutional treatment of Lakeside-Scott. However, the Multnomah County Charter in effect during the relevant period directs that the County Chair "shall be the chief executive officer and personnel officer of the County." (Morf Aff, Ex 21, p. 3). The County Chair during the relevant time was Diane Linn, not Fuller. There is no evidence in the record that the Multnomah County Chair had any involvement in reviewing Lakeside-Scott's administrative leave or termination decision. Moreover, the evidence does not suggest that Multnomah County's Chair engaged in a widespread policy or practice of retaliating against those who speak out against Brown. Nevertheless, Lakeside-Scott argues that liability should attach because Fuller had "discretionary authority" to fire her. In Chew v. Gates, 27 F.3d

1432 (9th Cir. 1994), the plaintiff brought a Section 1983 action against the city, policy chief and the supervisor and officers of a canine unit, alleging that the release of a police dog violated his Fourth and Fourteenth Amendment rights. The Ninth Circuit held "[a] city cannot escape liability for the consequences of established and ongoing departmental policy . . . by permitting such basic policy decisions to be made by lower level officials who are not ordinarily considered policymakers." Id. at 1445.

Unlike Chew, Fuller only made a decision to terminate Lakeside-Scott. There is no evidence that Fuller made any policy decisions. This case more closely parallels Pembaur, where the Supreme Court plainly held that an official's discretion to hire and fire does not give rise to municipal liability unless the official is also a final policymaker of employment policy. Pembaur, 475 U.S. at 483 (holding that municipal liability under Section 1983 "attaches where-and only where-a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question").

In short, Fuller's discretion to fire Lakeside Scott does not establish that she is a final policymaker for Multnomah County. Thus, summary judgment on the Section 1983 claim against Multnomah County and Brown in her official capacity is granted because any ratification theory fails as a matter of law.

II. Section 1983 Liability of Brown in Her Individual Capacity (First Claim)

Also in the First Claim, Lakeside-Scott alleges that Brown, in her individual capacity, "was personally referenced by [Lakeside-]Scott's objections" and "intentionally and□or recklessly violated [her] First Amendment rights[.]" (Amended Complaint, ¶ 19).

A. Legal Standards

To prevail under Section 1983 based on an alleged First Amendment violation, a plaintiff must demonstrate: (1) she engaged in protected speech; (2) she was subjected to an "adverse employment action;" and (3) that her speech was a "substantial or motivating" factor for the adverse employment action. Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 675 (1996); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 283-84 (1977); Johnson v. Multnomah County, Or., 48 F.3d 420, 422 (9th Cir. 1995). After a *prima facie* case has been established, a defendant can still prevail by showing by a preponderance of the evidence that the plaintiff would have been terminated from employment even in the absence of protected speech. Mt. Healthy, 429 U.S. at 287.

"[S]peech cannot be protected unless it 'substantially involved matters of public concern.'" Johnson, 48 F.3d at 422 (quoting McKinley v. City of Eloy, 705 F.2d 1110, 1114 (9th Cir. 1983)). Once a plaintiff has shown "that the statements were of public concern, then the burden shifts to the County to show that its legitimate administrative interests

outweigh the First Amendment interest in [Lakeside-Scott's] freedom of speech." Id. (citations omitted.)

B. Analysis

Defendants argue that the applicable statute of limitations bars most of the incidents alleged to give rise to plaintiff's Section 1983 claim against Brown in her individual capacity. Defendants further argue that any First Amendment claim against Brown in her personal capacity fails because Lakeside-Scott cannot establish a *prima facie* case. Last, defendants argue that Multnomah County's stated reasons for Lakeside-Scott's termination are not pretextual and she would have been terminated irrespective of her alleged protected speech. For the reasons that follow, dismissal of this claim is premature.

1. Statute of Limitations

Section 1983 does not provide a time limit for claims. Thus, a statute of limitation is borrowed from state law. The Ninth Circuit classifies Section 1983 claims as personal injury actions. Davis v. Harvey, 789 F.2d 1332, 1333 (9th Cir. 1986). Oregon's general tort statute provides a two-year statute of limitations. O.R.S. 12.110(1). Because Lakeside-Scott filed her BOLI complaint on November 6, 2002, her claims are limited to conduct occurring after November 6, 2000. Several alleged incidents are thus time-barred, including the: (1) reclassification decision occurring on January 9,

1999; (2) unsuccessful promotional requests in 1998 and 1999; and (3) assignment of tasks outside Lakeside-Scott's classification in 1998. Thus, the only remaining alleged incidents include Lakeside-Scott's: (1) request for ergonomic accommodation; (2) request for a promotion in May 2001; and (3) feelings of being singled out.

2. ***Prima Facie* Case**

Brown asserts that she was unaware of Lakeside-Scott's protected speech until October 2001, after the BOLI complaint was filed, and she did not subject Lakeside-Scott to any adverse employment action in retaliation for engaging in protected speech. Lakeside-Scott counters that Brown was aware of Lakeside-Scott's statement and was actively involved with many day-to-day issues at the DCJ, including Lakeside-Scott's unsuccessful attempt at promotion in 2001.

Lakeside-Scott argues that she was denied 2001 promotion because she continuously complained that Brown preferred hiring gay and lesbian employees and improperly awarded Multnomah County service contracts. The facts establish that Lakeside-Scott did not keep her opinions quiet. (See e.g., Turner Investigation Report, Morf Ex 3, p. 7 (indicating that Lakeside-Scott "complained a great deal" and "consumed a large amount of management's time"). She continually complained to: (1) her immediate supervisor, Hogue; (2) Hogue's supervisor, Gorton; (3) a non-supervisor, Tami Williams (Information Services Coordinator below Gorton); and (4) her coworkers. Lakeside-Scott was informed that she

was not promoted in 2001 due to her lack of follow-through on projects. However, when viewing the facts in Lakeside-Scott's favor, she had been openly complaining about Brown and her practices continuously for approximately three years. Moreover, employees in another department ranked Lakeside-Scott first for the position in 2001, yet she finished fifth out of five candidates by "management" in her department. While the facts are not entirely clear, "management" may include Hogue and Gorton who, in turn, may have failed to appropriately rank Lakeside-Scott because they knew that Brown would not promote her because of her constant complaining about Brown's practices. A question of fact exists. Thus, summary judgment is premature on the issue of whether Lakeside-Scott can establish a *prima facie* case.

3. Pretext

Defendants next argue that Lakeside-Scott would have been terminated from employment even in the absence of her protected speech. Lakeside-Scott counters that the reasons for her termination are pretextual.

A public employer cannot be held liable for retaliation if it would have taken the adverse action absent the employee's protected conduct. "An employee who makes an unprotected statement is not immunized from discipline by the fact that this statement is surrounded by protected statements." Waters v. Churchill, 511 U.S. 661, 681 (1994). The Supreme Court has reasoned that:

> [a] borderline or marginal candidate . . . ought not to be able, by engaging in [protected] conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

Mt. Healthy, 429 U.S. at 286.

Fuller terminated Lakeside-Scott for her admitted misconduct in accessing email and calendars of Multnomah County employees and then using County time and equipment to compile, print and distribute her journal. This information was accessible because of Lakeside-Scott's position as a Systems Specialist. While defendants contend that Lakeside-Scott had absolutely no business purpose to access the email of other employees, or spend time compiling, printing, and distributing her journal, Lakeside-Scott counters that her supervisor, Hogue, had directed her to print and compile a list of those misusing the email system. Hogue, however, denies this. This credibility determination is for a jury.

Moreover, it is unclear from the record just how Fuller learned of Lakeside-Scott's indiscretions and which acts prompted the investigation and which acts were discovered during the investigation and in the course of discovery in this lawsuit. What is clear from the record, however, is that Lakeside-Scott was placed on administrative leave eleven days after filing her BOLI complaint. This sufficiently raises a question of whether the asserted cause of Lakeside-

Scott's termination is pretextual. Accordingly, summary judgment on this claim is denied.

III. Whistleblowing (Second Claim)

Last, Lakeside-Scott alleges that Multnomah "County discharged [her] because: (a) She objected to the County's conduct prior to the filing of her BOLI complaint in October 2001; and (b) Lakeside-Scott exercised her right to file with [BOLI], all in violation of O.R.S. □□9A.203(b) (c) and (d)." (Amended Complaint, ¶ 24).

A. Legal Standards

This District applies a Title VII retaliation framework when assessing retaliation claims under the Oregon Whistleblower Act. See e.g., Ryan v. Patteron Dental Supply, Inc., 2000 WL 640859, *29 (D. Or. May 12, 2000) (citing Henderson v. Jantzen, Inc., 79 Or. App. 654, 719 P.2d 1322 (1986)). To establish a *prima facie* case of retaliation under Title VII, a plaintiff must demonstrate: "(1) that she was engaging in a protected activity, (2) that she suffered an adverse employment decision, and (3) that there was a causal link between her activity and the employment decision." Trent v. Valley Elec. Ass'n Inc., 41 F.3d 524, 526 (9th Cir. 1994) (citing E.E.O.C. v. Hacienda Hotel, 881 F.2d 1504, 1513-14 (9th Cir. 1989)). Additionally, a plaintiff must show that her complaints were the "likely reason" for the employer's negative actions. Cohen v. Fred Meyer, Inc., 686 F.2d 793, 796 (9th Cir. 1982). Oregon has a one year statute of limitations for a whistleblower

claim occurring after January 1, 2002. O.R.S. 659A.875.

Pertinent sections of Oregon's Whistleblower Act provide that no public employee shall:

> (b) Prohibit any employee from disclosing, or take or threaten to take disciplinary action against an employee for the *disclosure of any information* that the employee reasonably believes is evidence of:
>
> > (B) Mismanagement, gross waste of funds or abuse of authority or substantial and specific danger to public health and safety resulting from action of the state, agency or political subdivision[.]

ORS 659A.203(1)(b)(B) (emphasis added).[2]

B. Analysis

Defendants argue that Lakeside-Scott cannot

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[2] No Oregon case brought under O.R.S. 659A.203(1)(b) has defined "disclosure." See e.g., Young v. State, 182 Or. App. 210, 47 P.3d 926 (2002). Because the Oregon Whistleblower Act is very similar to the federal Whistleblower Protection Act of 1989 ("WPA"), decisions by federal courts concerning the WPA are helpful in defining the sufficiency of a disclosure. In addressing this precise issue, the Federal Circuit concluded that reports of wrongdoing to supervisors are protected if made to a person "in a supervisory position, other than the wrongdoer himself[.]" Huffman v. Office of Pers. Mgmt., 263 F.3d 1341, 1351 (Fed. Cir. 2001). Here Lakeside-Scott made numerous disclosures to Hogue and Gorton, supervisors other than the wrongdoer, Brown.

establish the third element necessary for a *prima facie* retaliation case because there is no causal link between her activity and the employment decision. In other words, defendants contend that Lakeside-Scott's whistleblowing activity did not cause her termination.

Lakeside-Scott admits that she maintained a journal, which she printed and disseminated while at work. She also admits to accessing other employee's private email and calendars that were not password protected, but did so upon the instruction of her supervisor, Hogue. Lakeside-Scott contends that these acts do not justify her termination.

In Hardie v. Legacy Health Sys., 167 Or. App. 425, 435, 6 P.3d 531, 538 (2000), the Oregon Court of Appeals clarified the causation analysis under Oregon law: "The crux of the standard, regardless of which phraseology is attached to it, is whether, in the absence of the discriminatory motive, the employee would have been treated differently." It is Lakeside-Scott's burden to show that she would have not been terminated in the absence of Brown's allegedly unlawful motive. Id., 167 Or. App. at 435, 6 P.3d at 537.

> In Price Waterhouse v. Hopkins, [490 U.S. 228, 240 (1989)], the United States Supreme Court explained: "But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether, even if that factor had been absent, the event nevertheless would have transpired in the same way." If an event would have transpired in the same way, a factor is not a "but-for" cause.

Id., 167 Or. App. at 435 n6, 6 P.3d at 537 n.6.

Lakeside-Scott argues that she would not have been terminated but for her continuous complaints, culminating in a BOLI complaint, that Brown preferred promoting gay and lesbian employees and engaged in contract preferences. As discussed above, the record raises questions of fact on this issue, namely: (1) whether there is a link between the close timing of Lakeside-Scott's BOLI complaint and being placed on administrative leave; (2) how Fuller discovered Lakeside-Scott's unauthorized email and calendar access; (3) whether Fuller learned of Lakeside-Scott's inappropriate acts prior to the investigation, after the investigation, or during the course of discovery in this lawsuit; (4) whether Fuller was aware of Lakeside-Scott's complaints of favoritism in the hiring and promoting of gay and lesbian employees and in specially awarding service contracts prior to the date of filing her BOLI complaint; and (5) whether Hogue indeed instructed Lakeside-Scott to access the email of other employees.

At this stage, Lakeside-Scott has provided some, albeit slim, evidence to raise a material question of fact on the causation element necessary to sustain a whistleblower claim. Thus, the Oregon Whistleblower Act claim remains.

CONCLUSION

For the reasons set forth above, defendants' Motion for Summary Judgment (docket #39) is GRANTED with respect to the First Claim against Multnomah County and otherwise DENIED.

IT IS SO ORDERED.

DATED THIS 11TH DAY OF May, 2004.

/s/ Michael w. Mosman
MICHAEL W. MOSMAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LEA LAKESIDE-SCOTT,
Plaintiff,

v.

MULTNOMAH COUNTY
and JANN BROWN,
Defendants.

CIVIL NO. 02-1505-MO

ORDER ON
POST-TRIAL MOTIONS

MOSMAN, J.,

Before the court are defendant Multnomah County's renewed motion for judgment on partial findings (Docket #137), defendant, Jann Brown's, renewed motion for judgment as a matter of law (#139) and plaintiff, Lea Lakeside-Scott's, motion to modify the pretrial order (#154).

Following a jury verdict, plaintiff received economic damages of $140,000, non-economic damages of $10,000 and punitive damages of $500,000 for retaliation by Jann Brown after she engaged in protected speech.

I. Jann Brown's Renewed Motion for Judgment as a Matter of Law

Defendant Brown seeks judgment as a matter of law pursuant to Fed. R. Civ. P. 50 (b). Defendant Brown maintains that no reasonable jury could

conclude that she retaliated against plaintiff by terminating her because she engaged in protected speech. She also argues that the punitive damage award be dismissed.

Under Rule 50, a court may grant a motion for judgment as a matter of law if "there is no legally sufficient evidentiary basis" for the jury's decision. The court must view the evidence in the light most favorable to the nonmoving party. Ace v. Aetna Life Ins. Co., 139 F.3d 1241, 1246 (9th Cir. 1998). Plaintiffs "should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962).

To establish a *prima facie* violation of plaintiff's First Amendment rights, plaintiff must have proven: (1) she engaged in protected speech, (2) she was subjected to an adverse employment action, and (3) her speech was a substantial or motivating factor for the adverse employment action. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977). Upon proving a *prima facie* case, defendant can prevail by proving "by a preponderance of the evidence that it would have reached the same [adverse employment] decision . . . even in the absence of the protected conduct." Id.

Brown does not challenge the first prong. On the second prong Brown argues plaintiff failed to establish that she caused plaintiff's termination. Brown argues that the fact plaintiff was terminated is, standing alone, insufficient to prove this prong because the evidence at trial established that Fuller

made the decision to terminate plaintiff on her own. In response, plaintiff argues that the jury had the following evidence. First, that there were discrepancies in defendants' version of events between the time plaintiff filed her BOLI complaint and when she was terminated. Second, there is proximity in time between plaintiff's filing of her BOLI complaint and the time it was decided to access Landis' computer and the discovery of plaintiff's journal. Third, the fact that Brown admits to being shocked by the allegations in the BOLI complaint and that she took them personally.

These facts, however, do not directly contradict Fuller's statement that she alone made the decision to terminate plaintiff. The court does recall some additional evidence that may suggest Brown could have had input to Fuller's decision. First, Ms. Fuller, Ms. Brown and County counsel met shortly before the decision to terminate plaintiff was made. Second, plaintiff's computer was set up in Brown's office after plaintiff was placed on administrative leave. This suggests that Brown was participating in the investigation and possibly the decision to terminate plaintiff. While thin, this evidence does provide a legally sufficient basis for the jury's decision that Brown played a part in plaintiff's termination.

Defendant Brown does not appear to challenge the third prong, whether a jury could infer that plaintiff's speech was a substantial or motivating factor in her termination. Here, there is evidence that less than two months passed between her BOLI complaint and her being placed on administrative leave. Also, Ms. Brown admits to being shocked by

the BOLI complaint and that she took its allegations personally. This is enough to satisfy this prong.

Defendant Brown additionally argues that plaintiff would have been terminated regardless of her speech. Under this theory, "defendants were required to show that they would have taken the same action even in the absence of the protected conduct." Settlegood v. Portland Public Schools, 371 F.3d 503 (9th Cir. 2004) (internal quotation omitted). This is a reasonable defense and one the jury rejected. The jury had evidence from Monna Hogue that plaintiff's suspension was in retaliation for her BOLI complaint. Also, Ms. Fuller was unable to determine whether her access to other employees' emails was accidental. As the Settlegood court noted, under Rule 50 I can only reverse the jury's decision if it is clear that the jury reached an erroneous result. Id. at 513. This the court cannot say.

Defendant Brown also argues that no reasonable jury could conclude that her conduct was "motivated by evil motive or intent, or . . . involves reckless or callous indifference" to plaintiff's First Amendment rights. Smith v. Wade, 461 U.S., 30, 56 (1983). It was plaintiff's theory that she was terminated because she complained that her supervisors favored lesbians over heterosexual women. The jury found this to be so. Given this finding, it is not a stretch to believe the jury would also find evil, retaliatory intent in plaintiff's termination. This is especially true because the jury rejected the defense that plaintiff would have been terminated regardless because she was caught snooping in emails she was not authorized to access.

Consequently, the court rejects defendant Brown's argument that punitive damages should be dismissed.

II. Multnomah County's Renewed Motion for Judgment on Partial Findings

Defendant Multnomah County seeks Judgment on Partial Findings pursuant to Fed. R. Civ. P. 52 (c) on plaintiff's second claim for relief against the County under ORS 659A.203 (c) and (d). Plaintiff did not contest the dismissal of her claims under these subsections, therefore Multnomah County's motion (#137) is GRANTED.

III. Plaintiff's Motion to Modify Pretrial Motion

After agreeing to the dismissal of 659A.203 (c) and (d), plaintiff realized that the pretrial order only listed those subsections as the basis for plaintiff's state law whistleblower claim. Plaintiff states it fully intended, but neglected to include ORS 659 (b) as its theory of recovery for whistleblower liability.

Federal Rule of Civil Procedure 16 (e) provides that pretrial orders "shall control the subsequent course of the action unless modified by subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice."

This court considers several factors in determining whether to modify a pretrial order: "(1) the degree of prejudice to defendants if the order is modified; (2) the ability of the defendants to cure the prejudice; (3) the impact of the modification on the orderly and efficient conduct of the case; and (4) any

degree of willfulness or bad faith on the part of the party seeking modification." Byrd v. Guess, 137 F.3d 1126, 1132 (9th Cir. 1989). The parties are in substantial disagreement about the degree of prejudice and surprise to defendants. Plaintiff argues the County would not be prejudiced by the modification because: (1) voluminous documents were exchanged and depositions held in which the Count probed the subsection (b) claim and (2) defendants' focused their summary judgment arguments on subsection (b) and were, therefore, quite familiar with it. Defendants maintain they would have presented different evidence at trial and if the amendment were allowed it would require a new trial.

The court finds that the degree of prejudice to defendants is high and it would be exceptionally difficult to cure the prejudice. The impact on the orderly conduct of trial is high given that defendants insist new evidence must be admitted. The court does not find willfulness or bad faith by plaintiff, but is concerned that plaintiff failed to notice the omission of subpart (b) in two pretrial orders and in defendants' motions to dismiss the whistleblower claim. The court therefore denies plaintiff's motion to amend the pretrial order.

Further, and independent of the denial of the motion to amend the pretrial order, the court finds that if even plaintiff were to prevail on the whistleblower claim, no new damages would be awarded because plaintiff has already recovered for the exact same harm in her federal claims for § 1983 for violating her First Amendment rights.

IV. Conclusion

For the reasons provided, defendant Multnomah County's renewed motion for judgment on partial findings (#137) is GRANTED, defendant Jann Brown's renewed motion for judgment as a matter of law (#139) is DENIED and plaintiff Lea Lakeside-Scott's motion to modify the pretrial order (#154) is DENIED.

IT IS SO ORDERED.

DATED: Portland, Oregon, May 23, 2005.

/s/ Michael W. Mosman
MICHAEL W. MOSMAN
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LEA LAKESIDE-SCOTT,

Plaintiff,

Civil No. CV 02-1505-MO

v.

COURT'S JURY
INSTRUCTION

MULTNOMAH COUNTY
and JANN BROWN,

Defendants.

Dated this 18th day of November, 2004.

/s/ Michael W. Mosman
MICHAEL W. MOSMAN
United States District Judge

JURY INSTRUCTION NO. 9

Lakeside-Scott claims that defendant Brown terminated her employment because she exercised her First Amendment rights. In order to prevail on this claim, plaintiff has the burden of proving each of the following elements by a preponderance of the evidence:

1. She engaged in protected speech, that is, she filed a BOLI complaint alleging that Brown favored gay and lesbian employees in hiring and promotion, and she complained that the County engaged in unlawful contracting practices.

2. Brown terminated plaintiff or caused her to be terminated; and

3. Her speech was a substantial or motivating factor in her termination.

If plaintiff has failed to prove any of these elements, your verdict should be for Jann Brown.

JURY INSTRUCTION NO. 10

Jann Brown is prohibited from terminating or causing the termination of an employee on a basis that infringes on the employee's constitutionally protected interest in freedom of speech.

JURY INSTRUCTION NO. 11

Plaintiff's speech cannot be protected by the First Amendment unless it substantially involves issues of public concern. Speech involving issues of public concern includes complaints about policies and practices that are perceived to be improper, and are

relevant to the public's evaluation of the performance of government agencies.

Plaintiff is not required to prove the truth of the protected speech in her BOLI complaint.

JURY INSTRUCTION NO. 12

There are three ways plaintiff can seek to show that her speech was a substantial or motivating factor behind the decision to discharge her:

1. She may introduce circumstantial evidence regarding the proximity in time between the protected speech and the retaliatory conduct; or

2. She can introduce circumstantial evidence that Brown expressed opposition to her speech; or

3. She can introduce circumstantial evidence that the County's proffered explanation for her discharge was false and pretextual.

You must all agree as to at least one of these three methods of showing her speech was a substantial or motivating factor behind the decision to terminate her.

JURY INSTRUCTION NO. 13

If you find plaintiff's protected speech was a motivating factor in her termination, you must determine whether defendant has proved by a preponderance of the evidence that plaintiff would have been terminated, regardless of her protected speech, for an independent lawful reason.

JURY INSTRUCTION NO. 14

Defendant contends that it would have made the same decision to discharge plaintiff because, after her termination, the County discovered plaintiff had used her administrative access to obtain computer files of her coworkers, management and Human Resources employees without authorization, and then copied those files and took them home. If defendant proves by a preponderance of the evidence that defendant could have made the same decision and would have discharged plaintiff because of this additional misconduct, you should limit any award of back pay to the date that the employer would have made the decision to discharge plaintiff as a result of this additional misconduct.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LEA LAKESIDE-SCOTT,

Plaintiff,

Civil No. CV 02-1505-MO

v.

VERDICT FORM

MULTNOMAH COUNTY
and JANN BROWN,

Defendants.

We, the jury, having been duly empaneled and sworn to try this case, find as follows:

1. Did plaintiff prove by a preponderance of the evidence that Jann Brown retaliated against plaintiff because she engaged in protected speech?

Answer: Yes __x__ No _____

If the answer is "No" to question 1 proceed no further, sign and return the verdict.

If the answer is "Yes" to question 1 proceed to the next question.

2. Did defendant prove by a preponderance of the evidence that the same actions would have been taken against plaintiff in the absence of her protected speech?

If your answer is "No" proceed to the next question. [original emphasis by jury]

If your answer is "Yes" proceed no further, sign and return this verdict.

3. Did plaintiff suffer damages because of Jann Brown's retaliation?

Answer: Yes __x__ No _____

If your answer is "No" proceed no further, sign and return this verdict.

If your answer is "Yes" in what amount□

Economic damages $140,000

Non-economic damages $ 10,000

Proceed to question 4.

4. Should the economic damages be reduced because defendant proved that plaintiff would have been terminated for the misconduct that was discovered following her discharge?

Answer: Yes _____ No __x__

If your answer is "No" proceed to question □.

If your answer is "Yes" what are the economic damages after reduction? $ _____

Proceed to question 5.

5. Did plaintiff prove by clear and convincing evidence that Jann Brown willfully, knowingly, maliciously, intended to hurt plaintiff with a reckless and outrageous indifference to a highly unreasonable risk of harm to plaintiff and with a conscious indifference to her health, safety, and welfare, and if so, is she entitled to punitive damages?

Answer: Yes __x__ No _____

If your answer is "No" proceed no further, sign and return this verdict.

If your answer is "Yes" in what amount□

$500,000.

DATED this 19th day of November, 2004.

/s/ Steven Allred
PRESIDING JUROR

Excerpts of Trial Transcript – Brown-Further Direct

Q. And approximately a little bit more than a year before, you had Ms. Williams assist you in accessing Mr. Landis's email box on the server, did you have a private and personal relationship with Ms. Williams?

A. I did have a relationship with Ms. Williams. The timeframe I'm not sure matches with what you're asking me.

Q. What's your best recollection timewise□

A. The time frame was approximately April of 2000, and then it lasted ten or 11 months after that. So, that would be January or February of 2000.

Excerpts of Trial Transcript – Jones-Direct

Q. Do you know Jann Brown?

A. Yes, I do.

Q. How did you come to know Ms. Brown?

A. She was hired as my supervisor in -- I think it was '89.

Q. And how long was she your supervisor - -

A. No, I'm not clear on the year. Pardon me again. What?

Q. How long did she serve as your supervisor?

A. Eleven years - - no. I was a supervisor for 11 years. Jann was a supervisor over me for about six years.

Q. Aside from your working relationship, did you see Ms. Brown socially?

A. Yes.

Q. Did activities together?

A. Yes.

Q. And did that personal relationship change your working relationship?
A. It affected it, yes.
Q. In your view?
A. Yes.
Q. In what manner?
A. It made it more difficult.

Excerpts of Trial Transcript – Hogue-Cross

And the third point of disbelief was the issue - - excuse me. That to believe the existence of those emails required me to believe that my superiors were misusing the County system, and so for me it was very difficult to accept all three of those possibilities in one fell swoop.

Excerpts of Trial Transcript – Fuller-Direct

Q. What was your reaction upon reading the allegations that were in the BOLI complaint?
A. Well, I felt that if they were true, they were troubling, and some of them didn't make any sense to me, but some of them would have been serious violations of County policy if they were true.

Supreme Court, U.S.
FILED
OCT 13 2009
OFFICE OF THE CLERK

No. 09-176

IN THE

Supreme Court of the United States

LEA LAKESIDE-SCOTT,

Petitioner,

v.

JANN BROWN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should petitioner be granted certiorari on an adverse employment action that was not a basis of liability in the proceedings below?

2. Does the first part of the two-part burden shifting framework articulated in *Mt. Healthy City School Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) require a plaintiff/employee to prove causation between her discharge from employment and an individually named defendant/supervisor's alleged retaliatory animus?

3. Should petitioner be granted certiorari on an issue that the majority opinion did not reach?

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STATUTES INVOLVED IN THE CASE

Contrary to Scott's statement, the Oregon Revised Statutes are not at issue in this appeal. (Judgment dated July 29, 2005).

STATEMENT OF THE CASE

The Statement of Facts submitted by Scott includes irrelevant and argumentative facts regarding the speech and adverse employment actions at issue. Brown restates the background facts articulated by the Ninth Circuit in its Opinion and offers the following:

Scott was discharged from her job as a computer information systems specialist after an investigation revealed that she had improperly accessed and used the computers and email systems of her employer, Multnomah County. The discharge decision was made by Joanne Fuller ("Fuller"), the Director of the County's information systems department. In the proceedings below, Fuller and others reiterated that Brown played no role in Fuller's decision to discharge. (Excerpts of Trial Transcript pp. 177, 181, 182, 189, 209 and 210). Scott did not offer contrary evidence. Fuller ended Scott's employment because the magnitude of Scott's misconduct was on a scale that was completely different from what Fuller had seen in other employees and destroyed her ability to trust Scott to uphold the County's policies in the future.

Prior to discharge, Scott had filed a complaint with the Oregon Bureau of Labor and Industries ("BOLI") criticizing County operations and Jann Brown, an

intermediate supervisor between Scott and Fuller. After Scott was discharged she filed suit alleging that Brown discharged her in retaliation for her filing the BOLI complaint. The lawsuit contained other causes of action, adverse employment actions, and defendants; however, the only claim at issue on appeal is a First Amendment retaliation claim alleging that Brown discharged Scott for filing the BOLI complaint.

The First Amendment claim went to trial and the jury returned a verdict in Scott's favor. The trial court denied Brown's renewed motion for judgment as a matter of law ("JMOL"), and Brown appealed to the Ninth Circuit. The Ninth Circuit reversed and remanded for entry of judgment in Brown's favor because "there was insufficient evidence to support the verdict against Brown, given the evidence that it was Fuller's independent decision to terminate Scott." *Lakeside-Scott v. Multnomah County*, 556 F.3d 797, 800 (9th Cir. 2009) (App 3). Scott now requests a writ of certiorari of the Ninth Circuit's opinion.

REASONS FOR DENYING THE PETITION

The petition should be denied because Scott is seeking review of an adverse employment action that was not the basis for liability in the proceedings below. At trial and on appeal the only adverse employment action at issue was discharge from employment. Now, for the first time, Scott seeks review of "Brown's act in reporting plaintiff for investigation." The parties did not litigate such a claim, and the request for review of this newly articulated claim should not be accepted.

The petition should also be denied because this case is a run-of-the-mine First Amendment retaliation case that failed on causation. On appeal, the court properly applied the two part burden shifting framework established in *Mt. Healthy City School Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274 (1977) and found that Scott failed to demonstrate causation between Brown's alleged retaliatory animus and Scott's discharge. In so doing, the court adhered to the established legal precedent.

I. THE PETITION SHOULD BE DENIED BECAUSE SCOTT SEEKS CERTIORARI ON AN ADVERSE EMPLOYMENT ACTION THAT WAS NOT PRESENTED TO THE JURY OR ON APPEAL.

Scott's discharge was the only adverse employment action before the trial court and on appeal. Now, for the first time, Scott argues that "Brown's act in reporting plaintiff for investigation is an adverse act sufficient to constitute a constitutional harm." (Petition at 17). As a general rule, "a federal appellate court does not consider an issue not passed upon below." *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2618 (2008) *citing Singleton v. Wulff*, 96 S. Ct. 2868 (1976). Scott seeks review of an employment action that was not litigated. This Court should decline that request.

During trial, the court inquired as to the basis of liability, and Scott's attorney stated that discharge was the adverse employment action at issue:

> THE COURT: So you're left with the discharge as a claim for liability?
>
> MR. FISHER: That's correct.
>
> THE COURT: And other events that you argue demonstrate that liability, but the claim for liability now is only discharge.
>
> MR. FISHER: It has always been that way, at least from the plaintiff's - that was my intention. I thought I had communicated the basis for liability under this claim throughout the case.

(Excerpt from Trial Transcript pp. 303 and 304). In addition, the jury instructions and Order on post-trial motions demonstrate that the only adverse employment action at issue below was Scott's discharge. (App. 67-68 and 74-76). Scott did not make any appeal from the trial court, and limited her arguments in opposition to Brown's appeal to retaliatory discharge. As noted by the Ninth Circuit:

> [w]e limit the scope of our inquiry to Scott's ultimate termination. Although being placed on administrative leave might qualify as an adverse employment action and we have suggested an investigation of an employee might so qualify, *see, e.g., Poland v. Chertoff*,

> 494 F.3d 1174, 1180 (9th Cir. 2007); *Ulrich v. City and County of San Francisco*, 308 F.3d 968, 977 (9th Cir. 2002), Scott neither argued these theories in the district court nor in her briefs on appeal, consistently stating that her retaliatory conduct claim was based solely on her discharge. Accordingly, we do not consider whether initiating the inquiry into Scott's activities or placing her on administrative leave were themselves adverse employment actions for which Brown could be held liable independent of Scott's termination.

Lakeside-Scott v. Multnomah County, 556 F.3d 797, 803 (9th Cir. 2009) (App 23-23, Ftnt 1). If Scott intended to pursue an adverse employment action in addition to discharge, she should have litigated that claim. Scott failed to do so, and the petition should be denied. *Id.*

II. CERTIORARI IS NOT APPRORIATE BECAUSE THE MT. HEALTHY STANDARD WAS PROPERLY APPLIED.

The Ninth Circuit applied *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977) standard to this First Amendment retaliatory discharge claim, and found that "[c]ausation is the dispositive issue." (App at 10). In applying that standard, the court held that:

> [o]n the facts of this case, where the evidence shows 'that a final decision maker made a wholly independent, legitimate decision to discharge the plaintiff, uninfluenced by the

> retaliatory motives of' Brown, we hold that the neutrality of the decisionmaking process eliminated any 'causal' link to Brown's bias.

Lakeside-Scott v. Multnomah County, 556 F.3d 797, 806 (9th Cir. 2009) (*citing Gilbrook v. City of Westminster*, 177 F.3d 839, 855 (9th Cir. 1999) (App at 13-14).

Scott argues that the court improperly shifted the burden of proof to plaintiff. However, Scott fails to recognize that under the *Mt. Healthy* standard it is the plaintiff/employee's burden of proof to demonstrate causation. *Marable v. Nitchman*, 511 F.3d 924, 929 (9th Cir. 2007) (*quoting Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir. 2003), *citing Bd. of County Comm'rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668, 675, 116 S. Ct. 2342, 135 L. Ed. 2d 843 (1996)); *see also Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977); *Settlegoode v. Portland Pub. Schs.*, 371 F.3d 503, 510 (9th Cir. 2004). Only if "the plaintiff makes those showings, then the burden shifts to the defendant to show 'by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the [plaintiff's] protected conduct.' " *Gilbrook*, 177 F.3d at 854 (*quoting Mt. Healthy*, 429 U.S. at 287). In applying these standards, the court recognized that:

> the ultimate question of the subordinate's liability "is an intensely factual one, the results of which will vary depending on the circumstances," *Ostad*, 327 F.3d at 883

> (*quoting Gilbrook*, 177 F.3d at 855), we hold that Brown cannot be found liable based on her limited involvement in the chain of events that ultimately led to Scott's termination.

Lakeside-Scott v. Multnomah County, 556 F.3d 797, 807 (9th Cir. 2009) (App 16). Here, Scott failed to demonstrate that Brown's conduct was a substantial or motivating factor in the discharge decision, and the retaliatory discharge claim was properly dismissed as a matter of law.

The court did not apply a new or different standard of causation, nor did it alter the *Mt. Healthy* burdens of proof. Scott may disagree with the factual findings of the Court, but any rulings on factual disagreements would have little practical application beyond this case. As such, the petition for certiorari should be denied.

III. REVIEW OF THE MT. HEALTHY AFFIRMATIVE DEFENSE SHOULD NOT BE GRANTED BECAUSE THE COURT DID NOT REACH THAT ISSUE.

Scott seeks review of the concurring opinion's ruling that Brown proved her affirmative defense under the second part of the *Mt. Healthy* burden shifting framework. Review should be denied because the majority opinion did not reach that issue.

The majority opinion ruled that judgment should be entered in favor of Brown because Scott failed to meet her burden of proof in the first part of the two-part burden shifting framework outlined in *Mt. Healthy*.

The majority did not reach the second part of the framework. The concurring opinion adopted the majority's result, but reasoned that Brown should prevail because she met her burden under the second part of the framework stating that:

> I would reverse the jury's verdict under part two, not part one, of the *Mt. Healthy* burden-shifting framework on the ground that, based on the facts presented, Fuller's investigation – and hence Scott's termination – was inevitable.

Lakeside-Scott v. Multnomah County, 556 F.3d 797, 815 (9th Cir. 2009) (App 36). Scott requests review of the concurring opinion and argues that the facts were misapplied. Certiorari should not be granted on this basis because the majority opinion did not reach the second part of the *Mt. Healthy* framework, and there is no ruling for this Court to review. Furthermore, even if the concurring opinion was appropriate for review, the court applied the proper legal standard and any alleged erroneous factual findings would not have any significance beyond this case.

CONCLUSION

For the reasons stated above, the petition for a *writ of certiorari* should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States

LEA LAKESIDE-SCOTT,

Petitioner,

v.

MULTNOMAH COUNTY, OREGON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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I.

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I.

INTRODUCTION

Respondent Jann Brown's opposition to Lea-Lakeside-Scott's Petition numbers three arguments: (1) Scott's petition should be denied because she seeks certiorari concerning an adverse employment decision that was not presented to either the jury or to the Ninth Circuit; (2) the Ninth Circuit did nothing improper in applying the standard in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977); and (3) this Court cannot consider Scott's challenge of Brown's Mt. Healthy affirmative defense because the Ninth Circuit did not reach that issue.

For the reasons set forth below, this Court should reject Brown's opposition and grant Scott's Petition.

REPLY TO BROWN'S STATEMENT OF CASE

Brown argues that Scott's Statement of Facts includes "irrelevant and argumentative facts" regarding the speech and adverse employment actions at issue. Brief In Opposition at 1. Brown relies upon the background facts the Ninth Circuit found together with a brief summary of the evidence concerning Fuller's role in the termination process.

Brown's discussion of the facts has two over-arching flaws. The first is that Brown does not dispute

the accuracy of Scott's Statement of Facts. Thus, Brown does not dispute that Scott presented at trial evidence that County employees, both management and non-management, were using the County computer system in violation of County policy, that Scott uncovered evidence of this misconduct when she accessed the County server and that Scott was the only employee disciplined for allegedly having violated that County policy.

While Brown considers these facts irrelevant and argumentative, these facts relate directly to the both the motives of Brown and the bias of other County witnesses, such as Fuller.

The second flaw shows how Brown studiously avoids applying the proper standard in its statement of facts. The trial court denied Brown's motion for judgment as a matter of law. The denial of a motion for judgment as a matter of law is reviewed de novo. Ostad v. Oregon Health Science University, 327 F.3d 876, 881 (9th Cir.2003). The Court views the evidence in the light most favorable to the party in whose favor the jury returned the verdict and draws all reasonable inferences in the her favor. Gilbrook v. City of Westminister, 177 F.3d 839, 847 (9th Cir. 1999).

Because Brown does not contest the accuracy of Scott's Statement of Facts and because Brown does not apply the proper standard of review to her Statement of Facts, this Court should accept Scott's Statement of Facts.

II.

REPLY TO BROWN'S ARGUMENT IN OPPOSITION

Brown advances two reasons this Court should deny Scott's Petition. Brown contends that Scott is seeking review concerning an adverse employment decision which was not raised in the trial court or on appeal. Second, Brown contends the Petition should be denied because this case involves nothing more than a run-of-the mill First Amendment case in which causation failed and the Ninth Circuit did nothing more than adhere to established legal precedent.

For the reasons set forth below, both of Brown arguments opposing the Petition should be rejected.

A. Scott Litigated The Question Of Whether Brown Terminated Scott Or Caused Her Termination

Brown erroneously argues that Scott limited her § 1983 claim to the question of whether Brown made, or participated in, the decision to terminate Scott. To support her argument, Brown points first to an exchange between trial counsel and the trial court. Second, Brown cites the Ninth Circuit majority opinion for the proposition that Scott "did not argue in the district court nor in her briefs on appeal" that Brown retaliated against her by starting the investigation or placing her on administrative leave. Brief In Opposition at 5. However, the record from the trial court establishes quite the opposite of what Brown contends.

In the trial court, there was no dispute that Brown was not the person who signed papers on behalf of the County that formalized Scott's discharge. What was disputed was Brown's role in causing Scott's discharge. Scott made clear at trial that her "discharge" consisted of a process of employment decisions leading to the discharge. Scott also made clear at trial that her discharge claim challenged Brown's involvement in the entire process leading to her discharge, not simply the decision to discharge.

The colloquy Brown cites in her Opposition between counsel and the trial court is a part of a longer conversation that Brown takes out of context. The longer conversation shows that the court was discussing whether plaintiff was claiming she was retaliated against by being denied a promotion, being denied ergonomic accommodations and by being terminated. It does not show Brown was limiting her discharge claim to the question of whether Brown made, or participated in, the decision to terminate Scott as distinguished from triggering the process leading to termination.

Brown omits the longer version which shows the correct context of the colloquy and which supports Scott's argument. The longer conversation reads as follows:

> "THE COURT: . . .You've got three adverse employment actions: ergonomic denial, failure to promote and termination.
>
> MR. FISHER: Correct.

THE COURT: You've got to show that her [Scott's] speech motivated those employment actions. If ergonomic denial occurs before Jann Brown knows of the speech, it can't by way of logic motivate that particular action.

Do you have any evidence that the ergonomic denial follows the speech?

MR. FISHER: I don't think that it does. I think that that does or the promotions do. What I have maintained in this case from the beginning is that it was the act of the exercise of speech on the filing of the BOLI complaint. The content has bearing only as it would relate to the motive and the substance – *the substance and motive – substantive motive of Ms. Brown to engage in the conduct she did between October 16th and the termination date.*

THE COURT: *What employment actions do you contend postdate the protected speech*?

MR. FISHER: *The placing on leave, the charges, the investigation and the discharge.*

THE COURT: So you're not contending that any ergonomic denial or any failure to promote postdates the protected speech?

MR. FISHER: Not as a basis for liability here. I am saying they have relevance, but for the reasons that you noting, they do not follow the speech. The speech was, and I told – I argued this in summary judgment, that the *gravamen*

of this claim has been Mrs. Scott's interaction with the Bureau of Labor and Industries, and as soon as that came to bear, it triggered the entire process that resulted in the discharge. And that is the interference.

THE COURT: So you're left with the discharge as a claim for liability?

MR. FISHER: That's correct.

THE COURT: And the other events that you argue demonstrate that liability, but the main claim for liability now is only discharge.

MR. FISHER: It has always been that way, at least from the plaintiff's – that was my intention. I thought I had communicated the basis for liability under this claim throughout the case.

THE COURT: Well, then, as an initial matter, to the degree that this case has anything that would go to the jury alleging liability under this theory for ergonomic denial, failure to promote, I grant defendant's motion. It's apparently not even your theory of the case, and I find that there is no evidence to support those adverse employment actions being motivated by protected speech, since they predate it under the evidence I've heard, the protected speech.

That leaves us with retaliation, which obviously did postdate the protected speech. . ."

Excerpt from Trial Transcript pp. 302-04. Emphasis added.

Contrary to Brown's central argument, there was no discussion where Scott's counsel stated or inferred that he was limiting the claim to the decision to discharge, as distinguished from triggering the process leading to the discharge. Furthermore, Scott's counsel explicitly informed the court that the "gravamen of this claim" was that the filing of the BOLI complaint "triggered the entire process that resulted in the discharge..." Scott clearly stated that the employment decisions involved in the discharge process were "the placing on leave, the charges, the investigation and the discharge."

Scott's argument that the "gravamen of this claim" was that the BOLI complaint "triggered the entire process that resulted in the discharge..." was based on Ninth Circuit law, as well as the law in four other circuits, that a defendant may be said to have proximately caused an injury if they personally participate in the act or *by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.* Johnson v Duffy, 588 F. 2d 740, 743, 744 (9th Cir 1978). See, citations at page 19 of Petition for Writ of Certiorari.

The rulings of the court, the jury instructions and the Verdict form all show that the parties litigated whether Brown terminated Scott or *caused her termination.* Nothing limited the discharge claim to the question of whether Brown made, or participated in, the decision to discharge Scott.

For example, Jury Instruction No. 9 asked the jury to decide whether "Brown terminated plaintiff or caused her to be terminated . . ." App. 75. Similarly, Jury Instruction 10 advised the jury, "Jann Brown is prohibited from terminating or causing the termination of an employee on the basis that infringes on the employee's constitutionally protected interest in the freedom of speech." App. 75.

If Scott's claim was limited as Brown argues, there would be no reason for inserting the phrase, "...or caused her termination" in the instructions.

In addition, the first question of the Verdict form the jury completed asks, "Did plaintiff prove by a preponderance of the evidence that Jann Brown retaliated against her because she engaged in protected speech." If Scott's claim were limited as Brown suggests, the Verdict form should have simply asked if "Jann Brown terminated her because she engaged in protected speech." App. 78.

The trial court's ruling on post-trial motions further demonstrates that Brown affirmatively litigated the broader question of whether she caused Scott's termination. The trial court outlined the three elements of a *prima facie* case of First Amendment retaliation and addressed what the parties litigated as to the second element of the claim, the adverse employment action as follows:

> "Brown does not challenge the first prong. On the second prong Brown argues that plaintiff failed to establish that *she caused plaintiff's termination.* Brown argues that the fact

> plaintiff was terminated is, standing alone, insufficient to prove this prong because the evidence at trial established that Fuller made the decision to terminate plaintiff on her own."

Order on Post-Trial Motions, p. 2-4. App. 68.

Finally, Judge Berzon's concurrence shows that Scott's termination claim was much broader than Brown or the majority panel have acknowledged. Related to the scope of the discharge claim, Judge Berzon wrote:

> "In this case, the majority concludes that Brown discovered Scott's journal and reported it to Fuller while 'engaged in activities typical and appropriate for her position,' and then states that Scott does not allege that Brown 'targeted her for investigation or selectively reported her misconduct.' See id. But Scott obviously does so allege, she has maintained from the outset and the jury must have found that Brown reported her to Fuller for a retaliatory reason. The difference between targeting someone for investigation and retaliating against them by reporting them, entirely escapes me."

App 27.

Judge Berzon was correct. Scott did "maintain from the outset" Brown targeted her for investigation and the record from the trial court shows her use of this argument in the trial court was obvious.

Thus, defendants Brown's central argument for

opposing Scott's Petition is simply false.

B. The Ninth Circuit Improperly Applied the Mt. Healthy Standard.

It is significant Brown fails to address Scott's citation to Hartman et. al. v Moore, 547 U.S. 250, 164 L.Ed.2d. 441, 126 S.Ct. 1695 (2006) in any manner. If, as Brown argues in her Brief in Opposition, Scott's case is a "run-of-the mill" First Amendment retaliation case, under Hartman Scott satisfies her burden of proof through evidence of a retaliatory motive and injury. Since there is no dispute that Scott produced evidence of a retaliatory motive and an injury, the Ninth Circuit's decision necessarily conflicts with both Hartman and Mt. Healthy.

As Scott's petition raises serious issues about whether the Ninth Circuit's decision in this case conflicts with Hartman and Mt. Healthy , Brown's silence concerning Hartman can only be read as a tacit acknowledgment of Scott's argument that her burden of proof did not include a requirement of proving the final decision-maker's decision was not a legitimate one wholly independent of the subordinate manager's unlawful motive, as required by the Ninth Circuit.

Consequently, in the absence of any analysis comparing the Ninth Circuit's Opinion and Scott's Hartman citation to resolve Scott's arguments, support of Scott's petition remains unchallenged by Brown.

C. Contrary to Brown's Assertion All Three Members of the Ninth Circuit Panel Did Reach the Issue of the Mt. Healthy Affirmative Defense.

Brown contends that Scott seeks review of the concurring opinion's ruling that Brown proved an affirmative defense under the second part of the Mt. Healthy burden shifting framework. Brown contends that review on this basis is inappropriate because the majority opinion did not reach the issue of the Mt. Healthy affirmative defense.

However, contrary to Brown's position, all three judges on the Ninth Circuit panel reached the Mt. Healthy affirmative defense.

As set forth in Scott's Petition, the majority panel assigned to Scott the burden of proving that the final decision maker's decision to terminate Scott was either not legitimate or not wholly independent of the retaliatory motive. By assigning this burden of proof to Scott, the majority panel effectively imposed on the plaintiff the burden of disproving what should be an affirmative defense under Mt. Healthy. Thus, the majority panel did reach the question of the Mt. Healthy affirmative defense.

As set forth in Scott's Petition, the concurrence explicitly addressed the Mt. Healthy affirmative defense.

CONCLUSION

The Ninth Circuit's decision in this case

conflicts with this Court's decisions in Hartman and Mt. Healthy. The Ninth Circuit's newly adopted burden of proof in First Amendment retaliation cases insulates from liability subordinate managers who retaliate against employees for their protected conduct. If not reversed, the Ninth Circuit's rule will protect retaliating supervisors and thus promote unlawful retaliation in violation of the First Amendment.

This Court should grant Scott's Petition.

Dated this 26th day of October, 2009.

Respectfully submitted,

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